Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

LIBERTY MUTUAL INSURANCE CO.,
Petitioner,

v.

CALDWELL TRUCKING PRP GROUP,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is a violation of the Due Process Clause or the Takings Clause for a state supreme court to impose millions of dollars in retroactive liability on an insurer by nullifying an unambiguous insurance contract provision solely for the purpose of promoting a judicially created policy of increasing the money available to pay for environmental clean up.

LIST OF PARTIES AND CORPORATE DISCLOSURE

The petitioner is Liberty Mutual Insurance Company. Liberty Mutual Group Inc. owns 100 percent of the stock of Liberty Mutual Insurance Company. LMHC Massachusetts Holdings Inc. owns 100 percent of the stock of Liberty Mutual Group Inc. Liberty Mutual Holding Company Inc. owns 100 percent of the stock of LMHC Massachusetts Holdings Inc. No publicly traded entity owns any stock of any of the above-named entities.

Respondent is the Caldwell Trucking PRP Group. Caldwell Trucking PRP Group is an unincorporated association of parties alleged by the United States Environmental Protection Agency to be responsible for the remediation of hazardous substance contamination at the Caldwell Trucking Superfund Site. The Caldwell Trucking PRP Group consists of: Schering-Plough Corporation, E.I. du Pont de Nemours and Company, Kearfott Guidance & Navigation Corporation, Saltire Industrial Inc., Curtiss-Wright Corporation, BP p.l.c., Cooper Industries, Inc., and Englehard Industries, Inc.

The other parties who participated in the proceedings before the Supreme Court of New Jersey were American Home Assurance Company, Industrial Underwriters Insurance Company, Lexington Insurance Company, and National Union Fire Insurance Company of Pittsburgh, PA.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of *certiorari* issue to review the judgment of the Supreme Court of New Jersey in this case.

DECISIONS BELOW

The opinion of the New Jersey Supreme Court is reported at 819 A.2d 410 and is reprinted in the Appendix ("App.") hereto at 1a. The opinion of the New Jersey Superior Court, Appellate Division, is reported at 787 A.2d 238 and is reprinted at App. 25a. The judgment of the trial court is unreported and is reprinted at App. 38a.

JURISDICTION

The opinion of the New Jersey Supreme Court was issued on April 10, 2003. A timely motion for reconsideration was denied on June 23, 2003. Justice Souter extended the time in which to file this petition to October 22, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (1993).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause, U.S. Const. amend. XIV, provides:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . .

The Takings Clause, U.S. Const. amend. V, provides:

> . . . nor shall private property be taken for public use without just compensation . . . .

The Contracts Clause, U.S. Const., art. I, § 10, cl. 1, provides:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .

STATEMENT OF THE CASE

The case raises a novel but profoundly important question: whether there are any federal constitutional limits on the power of a state supreme court to nullify, retroactively, the unambiguous contractual rights of a private party. It is beyond dispute that the opinion below, were it a law enacted word-for-word by the New Jersey Legislature, would be a blatant and egregious violation of the Contracts Clause of the U.S. Constitution and the even more fundamental constitutional security against retroactive laws that the Clause embodies. The question for this Court is whether a state supreme court has a broader constitutional authority to override the settled and unambiguous obligations of private contract, and even if so, whether such authority is functionally unlimited, as it would have to be for the decision below to stand.

A. Liberty's Non-Cumulation Clauses

This case involves nine insurance contracts entered into by petitioner Liberty and Spaulding Composites Company, between 1976 and 1984. The contracts provided "comprehensive general liability" (CGL) insurance. Each of the policies included two provisions which explicitly limit the amount of risk accepted by Liberty under its policies. First is a Declarations schedule which identifies the dollar limits for the different types of coverage provided. The 1976 contract had a $500,000 liability limit for each occurrence; the subsequent eight contracts each limited coverage to $1 million in liability for each occurrence. Second, each of the policies included a Limits of Liability section which specified how the dollar figures applied to different types of claims covered by the policy. The Limits of Liability section stated that the dollar limitation applicable to "each occurrence" was "the *total* limit of the company's liability for all damages because of bodily injury, personal injury or property damage as the result of any one occurrence." App. 66a (emphasis added).

As part of the Limits of Liability section, each contract included an identical clause – the "non-cumulation clause" – addressing and prohibiting the cumulation of liability over successive contracts. The clause accomplished this result in two steps. First, the clause provided that

> For the purpose of determining the company's total liability, all bodily injury, personal injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be construed as arising out of one occurrence.

App. 66a. In other words, the parties agreed by contract that they would treat an injury that occurs or reoccurs over time – i.e., environmental contamination from chemical exposure – as but a single occurrence for purposes of establishing Liberty's total liability for the costs of such an injury.

Second, the "non-cumulation" clause provided that the amount of liability incurred under any one contract for "one occurrence" (contractually defined, as noted, to include continuous exposures) "shall be reduced by the amount of each payment made by the company with respect to such occurrence under a previous policy of which this policy is a replacement." Thus, if Spaulding incurred, say, $10 million in liability for environmental contamination that began during the first of its contracts with Liberty and continued for each of the nine years in which Spaulding had a Liberty policy, Liberty would never be liable for more than $1 million. In year one, Liberty would owe the policy maximum of $500,000. In year two, Liberty would owe that year's policy maximum of $1 million reduced by the $500,000 already paid out under the first year's contract, meaning $500,000 in the second year and a total of $1 million over the first two years. In year three, Liberty again would owe that year's policy maximum of $1 million, this time reduced by the full $1 million already paid out under the prior policies, for a total of zero additional liability. Year four, and all subsequent years would be the same: Liberty's liability for costs associ-

ated with this single occurrence would be the maximum $1 million for that year, reduced by the full $1 million already paid out. In this way, the clause operated to prevent Liberty's liability from cumulating under each successive contract for each successive year with respect to a single occurrence.

The insurance contracts between Liberty and Spaulding were primary policies, i.e., policies that provided first-level coverage. Throughout the period that Liberty provided insurance to Spaulding, Spaulding also purchased excess policies, i.e., policies that provided second-level coverage which would be implicated if Liberty had paid its limit of liability for a particular occurrence. Each of these excess policies contained a non-cumulation provision which was substantively similar to the Liberty provision. *See* PRP N.J. S.Ct. Br., App., at a92-103.

Thus, when the parties entered into the contracts, they necessarily understood from the contracts' plain terms that Liberty's total potential liability for any one occurrence of environmental contamination, regardless how long the contamination occurred, was fixed: Liberty would be liable for a total of $1 million and not one penny more. The price Spaulding paid for its insurance for each year was necessarily premised on the parties' explicit understanding that Liberty would be assuming exactly that amount of risk for an event of contamination and no more – for the price of insurance, of course, reflects nothing more or less than the value of the risk being transferred.[1]

B. The *Owens-Illinois* Decision

In 1994, almost ten years after the expiration of the last of Spaulding's contracts with Liberty, the New Jersey Supreme Court decided *Owens-Illinois, Inc. v. United Ins. Co.*,

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[1] As anyone who has purchased homeowners' insurance knows, the more coverage one has, the higher one's premiums will be.

650 A.2d 974 (N.J. 1994). *Owens-Illinois* addressed the then-emerging problem of how to allocate insurance liability for an injury that occurs over a long period of time (such as asbestos injury or environmental contamination), during which the insured has successive insurance policies in effect. The first question the court addressed was how to decide when an injury "occurs" within the meaning of contracts that provide coverage for each "occurrence." The court observed that at least three possible alternative conceptions of when *injury* has occurred had been adopted by courts in other jurisdictions. *See Owens-Illinois*, 650 A.2d at 980-81 (quoting *Developments in the Law – Toxic Waste Litigation*, 99 Harv. L. Rev. 1458, 1579-81 (1986)). Under the "exposure" theory, the injury occurs when the injury-causing agent first contacts the body or property. *Id.* at 980. Under the "manifestation" theory, the injury occurs when the injury physically manifests itself in the body or on the property. Under the "continuous trigger" theory, the injury occurs continuously, as long as the injury-causing agent is affecting the body or property.

As *Owens-Illinois* reflects, the choice among these alternatives has significant consequences for insurance coverage. Depending on the theory chosen, the injury could "occur" only at one fixed moment for the purpose of triggering policy coverage, meaning that an insured would be covered only by the policy in effect at that moment. Under the "continuous trigger" theory, by contrast, the injury would "occur" in each of the years of successive policies, thereby potentially requiring the insurer to provide coverage up to the maximum of each year's policies. In this way, unless the contract specified otherwise, the insurer's liability could be cumulated over each of its successive policies.

The *Owens-Illinois* court adopted the "continuous trigger" theory and thus held that, where an insurance contract does not bar cumulation, "courts may reasonably treat the progressive injury or damage as an occurrence within each of

the years" of successive CGL policies. *Id.* at 995. Notably, *Owens-Illinois*'s resolution of this question did not address non-cumulation clauses, which were not involved in the case in any way. Rather, the adoption of the "continuous trigger" theory only paved the way for the court to answer the real question in the case: how to allocate among many insurers the insured's liability for injuries caused over a long period of time, when the insured had different policies and different insurers. *See id.* ("Because multiple policies of insurance are triggered under the continuous-trigger theory, it becomes necessary to determine the extent to which each triggered policy shall provide indemnity.").

The court adopted a pro rata theory of allocation: the insured's total coverage during the period of liability is established; each insurer's total potential liability during that period is assessed and compared to the insured's total coverage, producing each insurer's proportionate or pro rata share of total coverage; and then the insured's actual costs for the period are allocated to each insurer in accordance with the insurer's proportionate share of total coverage for the period.[2]

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[2] As the decision below explained it

> The basis of an individual insurer's liability is the aggregate coverage it underwrote during the period in which the loss occurred. Basically, a given insurer's liability is determined by comparing its particular exposure to the total amount of exposure assumed by all carriers of the triggered policies. This comparison yields a percentage that is then applied to the amount of loss the policyholder sustained.

App. 12a (quoting Jones & Hurwitz, *An Introduction to Insurance Allocation Issues In Multiple-Trigger Cases*, 10 Vill. Envtl. L.J. 25, 44-45 (1999)). In addition to this basic allocation rule, the *Owens-Illinois* court held that, for any years in which the insured was not covered, neither proportionate liability nor actual costs would be allocated to any insurer; instead the insured, who accepted the risk for that period, was required to

As noted, the insurance contracts at issue in *Owens-Illinois* did not include non-cumulation of liability limitations, and the court gave not the least intimation that such clauses would henceforth be void – much less retroactively void – as a result of its allocation ruling. To the contrary, the *Owens-Illinois* court specifically cautioned that its decision did not speak to the cumulation (or "stacking") of coverages under *successive* policies: "[T]o say that coverage is afforded under more than one policy seems different from saying that a policyholder may stack the limits of all the policies in effect during a period of repeated or continuous exposure." *Id.* at 990. The *Owens-Illinois* court also did not declare any policy language unenforceable. Again to the contrary, the court specifically acknowledged that "the contract of insurance" provides the source of any duty of an insurer "to pay any judgments." *Id.* at 978. The court found only that the particular policy language under consideration in that case was inapplicable.

C. The *Carter-Wallace* Decision

The New Jersey Supreme Court applied the *Owens-Illinois* rule four years later in *Carter-Wallace, Inc. v. Admiral Ins. Co.*, 712 A.2d 1116 (N.J. 1998), another case that had nothing to do with non-cumulation clauses. Whereas *Owens-Illinois* involved the allocation of liability among different insurers with successive polices, *Carter-Wallace* involved the allocation of liability among different insurers with concurrent policies providing coverage at different levels – specifically, "primary" and "excess" insurers – in continuous trigger liability situations. "Primary" insurance provides initial coverage up the limits of the contract. "Excess" or "secondary" insurance provides additional coverage, typically only after the primary coverage has been exhausted.

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bear the pro rata share of costs incurred during that period. *Owens-Illinois*, 650 A.2d at 994.

Allocation of liability between primary and excess insurers can be difficult in progressive injury cases, because during a multi-year period of injury, the insured is likely to have different primary and excess insurance contracts with different insurers with different amounts of coverage.

The excess insurer in *Carter-Wallace* argued that excess liability did not attach under *any* of the insured's excess insurance policies until the insured had exhausted *all* of its primary coverage for every year in effect during the period of injury. As a result, the excess insurer argued, if all of the primary coverage sufficed to cover the total costs of the injury, then no excess insurer would be liable. The New Jersey Supreme Court opted for a different rule: in progressive injury cases, the insured's total liability would be allocated pro rata for each year, and then each year's pro rata amount of liability would be assigned to primary and excess insurers in accordance with the policies in effect that year. Thus if the pro rata amount of liability in the first year exhausted the insured's primary coverage in that year, any excess insurer with a contract that year would be liable for any remaining amount for the year, up to the limits of its coverage in that year, and so on.[3] The court reasoned that "this approach makes efficient use of available resources because it neither minimizes nor maximizes the liability of either primary or excess insurance, thereby promoting cost efficiency by spreading costs." *Id.* at 1124. The court also found that this approach "promotes simple justice, by respecting the differ-

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[3] Suppose, for example, an insured incurred $10 million in liability for a ten-year progressive injury. The court would allocate $1 million of that injury to each of the ten years. Then the court would look to the policies in effect for each year. So, in year one, if an insured had $500,000 in primary coverage with insurer A and $500,000 in excess coverage with insurer B, each insurer would owe the limits of the policy. If in year two the insured had increased its coverage with insurer A to $1 million while keeping the same excess coverage with insurer B, then insurer B would owe nothing in year two.

ence between primary and excess insurance while not permitting excess insurers unfairly to avoid coverage in long-term, continuous trigger cases." *Id.* at 1121.

Although thus driven by concerns for efficiency and simple justice, neither the *Carter-Wallace* reasoning nor its result undermined – much less contradicted – any explicit contractual language in the applicable policies. Even more to the present point, nothing in the reasoning or result of *Carter-Wallace* addresses or even relates to the validity of non-cumulation clauses in primary CGL policies.

D. The Proceedings and Decision Below

Thus, until this case, New Jersey's leading insurance allocation precedents had hewed closely to the relevant contract language, applying broader policy concerns only to resolve matters unaddressed in the terms of the applicable insurance contracts. Breaking sharply from its own prior case law – and from its constitutional obligations to respect Liberty's firmly fixed, contractually based expectations – the New Jersey Supreme Court in this case held flatly void a directly applicable, unambiguous provision limiting Liberty's liability for costs incurred by its insured in cases of progressive injury. The court cited both *Owens-Illinois* and *Carter-Wallace* as supporting this result, but the citations are both wrong and irrelevant to the constitutional issue this petition raises. They are wrong because neither opinion suggests in any way that non-cumulation clauses are void under New Jersey law. They are irrelevant because even if the opinions did support such a result, the first of them was issued almost ten years after the last of the contracts at issue here expired, and thus in no way could have affected the parties' expectations when Liberty and Spaulding agreed to the liability limitation and priced the contracts on that basis.

1. Liberty's basic coverage responsibilities arose when Spaulding was identified in 1990 as a potentially responsible party for the disposal of hazardous lead-containing wastes at

the Caldwell Trucking Superfund Site in Fairfield, New Jersey. App. 4a. Spaulding declared bankruptcy in 1993. App. 4a. Caldwell Trucking Group PRP ("PRP") and the EPA filed a federal action against Spaulding in 1994 seeking to hold Spaulding responsible for cleanup costs. App. 4a.[4] In 1996, the district court granted PRP partial summary judgment, holding Spaulding liable for an undetermined amount of the cleanup costs incurred by PRP. App. 4a. Judgments of liability were ultimately entered against Spaulding totaling over $13 million. App. 5a.

In 1995, Spaulding began a state-court action seeking a declaratory judgment as to the liability of its insurers, including Liberty, for its potential cleanup responsibilities at the Caldwell Trucking site. Spaulding argued that it was entitled to $8.5 million in total coverage from Liberty across all nine of its contracts; Liberty argued that, under the plain language of the non-cumulation clause, its liability was limited to $1 million. The trial court granted Spaulding summary judgment, holding Liberty's non-cumulation clause to be "inapplicable" because it was "intended to govern cases involving a *single* occurrence causing damage over multiple years," App. 5a (emphasis added), whereas it read *Owens-Illinois* as holding that continuous environmental injury was to be treated as a "*separate* occurrence 'within each of the years of a CGL policy.'" App. 5a (emphasis added).

2. The Appellate Division reversed. The court's conclusion was simple and unassailable: "[T]he contract language

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[4] PRP initially joined Spaulding's insurers, including Liberty, as direct defendants, seeking contribution for Spaulding's cleanup responsibilities. *Caldwell Trucking PRP Group v. Spaulding Composites Co.*, 890 F. Supp. 1247 (D.N.J. 1995). The claims against Spaulding's insurers were dismissed on the ground that PRP itself had no claim against the insurers. *Id.* at 1256.

of the non-cumulation clause is clear and should be enforced." App. 27a. The court specifically addressed *Owens-Illinois* and *Carter-Wallace*, but "perceive[d] no inconsistency" between those decisions and "applying the clear language of Liberty's non-cumulation clause." App. 35a. The court noted that in both cases the New Jersey Supreme Court had been "unable to find the answer to the allocation issue in the language of the policy" and also had "found 'the traditional rules of interpretation to be unhelpful.'" App. 35a (quoting *Owens-Illinois*, 650 A.2d at 990). Accordingly, while it was proper for the prior decisions to follow "a method that was fair in light of the complexities of environmental litigation" where there was no contract language on point, in this case the Appellate Division could "find the answer in the clear language of the policy" and thus was "compelled" to apply that language. App. 35a. The court also rejected PRP's argument that the non-cumulation clause was an impermissible "other insurance" clause. The court held that other insurance clauses, including "escape" clauses, apply only when there are *concurrent* policies (typically written by different insurers) in effect. App. 36a. The non-cumulation clause, the court explained, was implicated by the *successive* policies of a single insurer, and thus was not an "other insurance" escape clause.[5] App. 36a. In fact, the "other insurance" provisions of Liberty's policies were contained in separate endorsements from the non-cumulation clause.

3. The New Jersey Supreme Court granted leave to appeal and reversed, reinstating summary judgment in favor of

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[5] In so ruling, the court also rejected the argument that the non-cumulation provision was an "escape" clause, a sub-category of other insurance provision. "Escape" clauses are looked on with disfavor by courts because they allow an insurer to escape liability altogether when other insurance applies. *See Insurance Co. of North America v. Continental Casualty Co.*, 575 F.2d 1070, 1072 (3d Cir. 1978).

PRP. PRP's main argument on appeal[6] was that the non-cumulation clause was not applicable because it was an "other insurance" clause. Like the Appellate Division, the New Jersey Supreme Court rejected this argument. All "other insurance" clauses, the court recognized, apply only when there are concurrent policies. Their point is to allocate among insurers with potentially overlapping coverage responsibilities. App. 20a. A non-cumulation clause, by contrast, applies when *one* insurer provides *successive* policies, as the court acknowledged. App. 20a. The point of a non-cumulation clause is not to allocate liability among different insurers, but to fix a limit on the total potential liability of the single insurer providing successive years of coverage. App. 20a ("a non-cumulation clause governs successive policies and prevents the accretion of limits when the policies have been triggered by a single occurrence").

The Court recognized that the non-cumulation language was directly relevant to the allocation issue:

> [A] non-cumulation clause generally, and Liberty's in particular, operates to limit an insurer's liability under multiple sequential CGL policies where losses related to a "single occurrence" trigger successive policies. . . . What the non-cumulation clause seeks to avoid is the "cumulation" of insurance policy limits when only one insured act or 'occurrence' is involved.

App. 21a. Nonetheless, this Court made an explicit determination to "look[] beyond contract language and traditional rules of insurance policy interpretation," App. 17a, rather than give effect to the contract language, stating:

> In a word, *Owens-Illinois* eliminated reliance on particular contract language (other than limits and exclu-

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[6] While the appeal was pending, Spaulding assigned all of its rights to coverage to PRP.

> sions) and on traditional rules of interpretation, and set forth a uniform standard for resolving allocation issues in long-tail environmental exposure cases.

App. 19a.

The court held the clause to be void as a matter of law "because it would thwart the *Owens-Illinois* pro rata allocation modality." App. 22a. That "modality," the court explained, "has, at its core, a public policy that favors maximizing, in a fair and just manner, insurance coverage for cleanup of environmental disasters." App. 23a. The court further explained that if a non-cumulation clause were actually enforced in accordance with the contract's terms – in accordance, that is, with the parties' specific agreement, necessarily reflected in the cost of the coverage purchased – "insurers who were actually 'on the risk' would be insulated from their fair share of liability in direct contravention of *Owens-Illinois*." App. 23a. Finally, the court distinguished the many cases from other jurisdictions enforcing non-cumulation clauses on the ground that "none of the cases . . . involves the application of the continuous trigger and pro-rata allocation methodology of *Owens-Illinois*." App. 23a-24a.

The court's conclusion that *Owens-Illinois* necessarily rendered the parties' non-cumulation clause void – and retroactively void at that – could not have been more of a surprise to Liberty. When Liberty issued its first policy to Spaulding in 1976, it had already "long been the law of [New Jersey] that the court is bound to enforce the policy as it is written." *Flynn v. Hartford Fire Ins. Co.*, 370 A.2d 61, 63-64 (N.J. Super., App. Div.), *certif. denied*, 379 A.2d 236 (N.J. 1977). New Jersey courts had been "insistent that clear basic terms and particular provisions of an insurance contract may not be disregarded at will and a new contract judicially made for the parties." *Linden Motor Freight Co., Inc. v. Travelers Ins. Co.*, 193 A.2d 217, 225 (N.J. 1963). Accordingly, New Jersey law recognized that "[a]bsent statutory

prohibitions, an insurance company has the right to impose whatever conditions it desires prior to assuming its obligations and such provisions should be construed in accordance with the language used." *Kampf v. Franklin Life Ins. Co.*, 161 A.2d 717, 721 (N.J. 1960). *Owens-Illinois* itself certainly did not deviate from this settled tradition. To the contrary, the *Owens-Illinois* Court acknowledged unequivocally that "[t]he source of any duty on the part of the Insurance Companies to defend actions or to pay any judgments is *obviously* in the contract of insurance." *Owens-Illinois*, 650 A.2d at 978 (emphasis added). Indeed, the primary "public policy" the court below identified as at the "core" of *Owens-Illinois* – maximization of insurance coverage – was in fact *explicitly* rejected by the *Owens-Illinois* court as a sufficient basis for imposing coverage liability: "A rule of law premised on nothing more than the result-oriented goal of maximizing coverage has been described as judicial legislation. A more consistent principle is required." *Id.* at 981 (internal quotation marks omitted).

In short, in no prior case – not *Owens-Illinois*, nor *Carter-Wallace*, nor any other – had the New Jersey Supreme Court ever held that a "public policy" of maximization of coverage could operate to render an unambiguous liability limitation in an insurance contract null and void. And certainly no decision had ever done so in a case decided twenty years after the policies had expired, undoing expectations settled literally for decades.

Second, leaving the errors of state-law precedent to one side, the suggestion of the court below that insurers "on the risk" would be relieved of liability by enforcement of the non-cumulation clause is wrong – indeed, it is nonsensical. An insurer can be "on" no more risk than the insurer agrees by contract to assume. If the insurer and insured agree that liability will not cumulate over successive policies, the insurer's "fair share of liability" is fixed by that agreement. There is nothing "fair and just" about "maximizing" Lib-

erty's coverage far beyond the specific maximum set forth in the parties' own contract of insurance.

4. Liberty moved for reconsideration. Liberty's motion not only explained how the court had badly misread its precedents, but also specifically raised federal constitutional issues under the Due Process, Takings, and Contract Clauses in respect to the court's ruling declaring the non-cumulation clause retroactively void. App. 58a-65a. More than two months later, the court denied the motion for reconsideration. App. 43a. This petition followed.

REASONS FOR GRANTING THE WRIT

It is common ground on this Court that "an unfair retroactive assessment of liability upsets settled expectations, and it thereby undermines a basic objective of law itself." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 557 (1998) (Breyer, J., dissenting); *see id.* at 533 (plurality); *id.* at 549 (Kennedy, J., concurring). The retroactive and wholly unforeseeable nullification of the non-cumulation clause here literally deprived Liberty of due process of law: the court's decision is a brazen act of judicial legislation, suspending Liberty's liability limitation for the openly avowed purpose of increasing the amount of insurance money available for environmental cleanup in the State of New Jersey. If the New Jersey Legislature had tried to enact as statute the result in this case, it would have plainly violated fundamental constitutional constraints intended to protect settled expectations and to ensure that the lawmaking process does not entirely lose sight of its "law" component. If courts are bound by fewer explicit constitutional constraints than are legislatures, it is only because the Framers quite reasonably presumed that courts, by their very nature, are always bound by the law – a system of reasoning and judgment that, while capable of evolving, does so only by incorporating prior judgments and building slowly upon itself, with the ultimate goal of protecting and enforcing a system of ordered and reasonable expectations in private affairs. *See generally* Holmes, The Path of

the Law, 10 Harv. L. Rev. 457 (1897). If "due process *of law*" means anything, it must be this: the traditional process of reasonably predictable decisionmaking through which private entitlements are protected and private obligations enforced. *See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring) (describing "due process of law" as "a delicate process of adjustment" that is "compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess").

The New Jersey Supreme Court departed radically from that tradition, and thus deprived Liberty of its right to "due process of law" in a most literal sense. Not only did the court wander far into the realm of legislative conduct, it went farther than even the legislature could ever go, explicitly impairing the obligation of Liberty's contracts and taking its property without just compensation. In order to increase insurance resources for environmental cleanup in the state, the New Jersey Supreme Court simply nullified an unambiguous limitation on the amount of liability Liberty had long ago agreed to assume for injuries caused by Spaulding. It did so even though Spaulding had never paid Liberty for the additional coverage it would now be receiving ($8.5 million in coverage obviously costs a lot more in premiums than $1 million in coverage), and it did so without providing Liberty any measure of compensation from the State for the new public burden of environmental cleanup the court had decided to impose on Liberty and other insurance companies. In substance, it is exactly as if Spaulding had paid for only $1,000,000 in coverage for environmental cleanup liabilities, but the Court nevertheless decided that Liberty should provide $8,500,000 in coverage, simply because the State would be better off if Liberty were forced to pay more for the injuries Spaulding had caused.

That is not due process. It is not even law. Certiorari should be granted.

I. THE DECISION BELOW VIOLATES THE DUE PROCESS CLAUSE

The decision of the New Jersey Supreme Court in this case violates due process in two distinct but related respects. First, the decision violates the basic constitutional protection of contractual rights afforded by such provisions as the Contracts Clause, as the principles of that Clause are incorporated against judicial decisionmaking through the Due Process Clause. Second, the decision violates the Due Process Clause's more general proscription against the imposition of unpredictable, severely retroactive civil liability.

A. The Decision Below Violates Liberty's Fundamental Rights To Contract, Which Are Protected From Arbitrary Judicial Impairment By The Due Process Clause

The decision blatantly impairs the obligation of Spaulding's insurance contract with Liberty. That much is not even in dispute. The square holding and explicit point of the decision below is to nullify Liberty's contractually guaranteed limitation on the liability it was assuming, so that more money would be available for environmental cleanup.

The Contracts Clause of the U.S. Constitution states that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." Although the Clause by its own terms applies only to legislative enactments, *see Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1924), its basic protection of existing contractual obligations necessarily applies to judicial decisions under the Due Process Clause; otherwise, the protection afforded by the Clause would be a virtual dead letter. *Cf. Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964) ("If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.").

This Court has recognized that contractual rights are "matters in which predictability and stability are of prime importance." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 271 (1994); *see id.* at 265-66 ("In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequence of their actions."); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978) ("Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them."). The Framers shared that view in spades: they considered the rights explicitly protected by the Contracts Clause "to be 'perhaps greater securities to liberty and republicanism than any [the Constitution] contains,'" and violations of such rights to be "'contrary to the first principles of the social compact and to every principle of sound legislation.'" *Carmell v. Texas*, 529 U.S. 513, 521 (2000) (quoting *The Federalist*, No. 44, at 282 (James Madison), No. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). They believed the Clause necessary for at least two reasons: to bar states from retroactively "changing the relative situation of debtor and creditor," *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 427-28 (1934); *see Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 503 (1987) (Contract Clause's "primary focus was upon legislation that was designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to satisfy."), and "to encourage trade and credit by promoting confidence in the stability of contractual obligations," *United States Trust Co. v. New Jersey*, 431 U.S. 1, 15 (1977). Those basic purposes would be frustrated just as easily by judicial suspension of contractual obligations as by legislative. It follows that courts must be bound to the essential principles, at least, of the Contracts Clause through every court's obligation to pro-

vide due process of law, even if courts are not bound to the letter of the Contracts Clause or to every detail of judicially-developed doctrine applying the Clause.

There is no doubt that the decision below, were it simply re-captioned "A Law Passed By The New Jersey Assembly," would violate the very essence of the rights protected by the Contracts Clause – and thus the rights also protected by the Due Process Clause. The Contracts Clause does not bar the enforcement of all laws that affect contractual obligations – inasmuch as virtually all economic legislation may have some effect on existing contracts – but the Clause does "impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." *Spannaus*, 438 U.S. at 242. If "the state law has, in fact, operated as a substantial impairment of a contractual relationship," as opposed to a mere "[m]inimal alteration," it is invalid. *Id.* at 244-45. Under this Court's precedents, an impairment is "substantial" if the contracting party "had no reason to anticipate" the impairment, and instead "relied heavily, and reasonably, on this legitimate contractual expectation in calculating" its obligations under the contract. *Id.* at 245-46. While a "temporary" impairment of contractual relationships might not be substantial, a law that works a "severe, permanent, and immediate change in those relationships—irrevocably and retroactively," *id.* at 250, obviously works a substantial impairment. The archetypal substantial impairment is one that "nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability" when those obligations are "in an area where the element of reliance [is] vital." *Id.* at 246-47.

That is exactly what the decision below does. Directly in the face of the Clause's most central purpose of barring states from "changing the relative situation of debtor and creditor," *Blaisdell*, 290 U.S. at 427-28; the decision "nullifies express terms" of the debtor-creditor insurance contract,

see Cohen v. Cohen, 126 N.J.L. 605, 609 (N.J. 1941) (insured-insurer relationship is "clearly that of debtor and creditor"), imposing "completely unexpected liability" and a "severe," "permanent," "immediate," and "retroactive" change in the parties' contractual relationship. This is all particularly harmful in an industry (insurance) where reliance on express contract terms is so critical, because the very nature of the industry depends upon being able to painstakingly analyze and calculate precise degrees of risk and transform that analysis into contractual terms. Just as the employer in *Spannaus* "made contributions to [its pension] fund based on actuarial predictions of eventual payout needs," *Spannaus*, 438 U.S. at 237, which were obviously based on its contractual obligations, so too did Liberty rely on actuarial predictions in forming its insurance contracts and determining the premiums it would charge.[7]

If the rights protected by the Contracts Clause mean anything, they must be secure against judicial infringement as well as legislative. This is not a question of interpretation committed to the courts, nor a question on the margins of contract enforcement – a question, say, of unconscionability or violation of public policy – where the exercise of reasonable judicial judgment is to be expected. This is a simple case of a state court refusing to enforce an unambiguous contractual right, for one reason – to make one party pay much

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[7] Even a "substantial" impairment may be upheld if it is "necessary" to serve a "significant and legitimate public purpose." *Keystone Bituminous Coal*, 480 U.S. at 505. Environmental cleanup may be an important public interest, but the decision below does not even purport to explain why it is "necessary" to serve that interest by forcing insurers to pay many times more for cleanup than they ever promised to pay. If those actually responsible for environmental damage cannot or will not pay for clean-up, leaving the public with the bill, then the public must pay it – confiscating resources from individual private parties to pay for perceived public needs is precisely what the Contracts Clause, among other constitutional provisions, is supposed to bar the State from doing.

more than it owes because the public would benefit from the confiscation. That will not justify state action of any kind, much less action by a court bound to provide due process of law. The rights underlying the Contracts Clause are impaired not once but twice in this case – first, by failing to enforce the contract as indisputably written, and second, by giving force to a substituted contract that the parties never made, one in which the potential liability for a continuing occurrence is $8,500,000 rather than $1,000,000.

B. The Decision Below Violates Due Process Because It Imposes An Unpredictable, Severe And Unfair Retroactive Insurance Liability

The decision below deprives Liberty of due process because it imposes a severe and deeply unfair retroactive civil liability on Liberty. Even if the Due Process Clause were not understood as incorporating Contracts Clause principles per se, the Due Process Clause itself exists more broadly to protect the same settled expectations the Contracts Clause protects specifically in the contract setting. As this Court has recognized, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disregarded." *Landgraf*, 511 U.S. at 265. Accordingly, "due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity." *Eastern Enterprises*, 524 U.S. at 549 (Kennedy, J., concurring). "If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership." *Id.*; *see id.* at 558 ("To find that the Due Process Clause . . . protects against an unfair allocation of public burdens through this kind of specially arbitrary retroactive means – is to read the Clause in light of a basic purpose: *the fair application of law*, which purpose harkens back to the Magna Carta.") (Breyer, J., dissenting). And if "an unfair

retroactive assessment of liability upsets settled expectations, and . . . thereby undermines a basic objective of law itself," *id.* at 558 (Breyer, J., dissenting), it follows that any judicial decision that upsets settled expectations by imposing an unfair retroactive liability on a party necessarily deprives the party of due process *of law itself.*

The Due Process Clause's protection of settled expectations is manifested in the "core due process concepts" of "notice" and "foreseeability." *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001); *see Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) ("notice" or "fair warning" is the "analytic touchstone" of due process analysis); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) ("foreseeability" is "critical to due process analysis"). These requirements of course ensure that a State's actions do not violate the settled, reasonable expectations of its citizens. These requirements apply to courts no less than to legislatures. Thus, this Court has held it to be a violation of due process for a court to assert jurisdiction over a person in the absence of state contacts sufficient to give the person notice of the state's power over him, *see Quill Corp.*, 504 U.S. at 313 (minimum contacts are a "proxy for notice"), to apply a state's law to a party's conduct in violation of the party's reasonable expectations, *see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985), and to impose a punitive damage award beyond what a party might reasonably expect given other indicators of the wrongfulness of the conduct, *see BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). It has also held that "limitations on *ex post facto* decisionmaking are inherent in the notion of due process." *Rogers*, 532 U.S. at 456.

The retroactive liability imposed here was imposed without notice, fair warning, or foreseeability of any kind. From 1976 to 1984, and for the two decades preceding the decision below, when Liberty assessed its potential liabilities, calculated premiums, and entered into contracts of insurance, the

law of New Jersey – and every jurisdiction in this country – was that courts were bound to enforce an insurance contract as it is written. As a result, when Liberty and Spaulding agreed to their nine contracts from 1976 to 1984, they had not the least reason to expect that the non-cumulation clause clearly fixing Liberty's total potential liability for continuous injuries would be nullified by a court twenty years later. Even if *Owens-Illinois* or *Carter-Wallace* had given such notice – and they assuredly did not – they were not decided until more than ten years *after* the last of the contracts expired.

Where ex post facto laws are by their nature fundamentally unfair when enacted by a legislature, they are likewise "fundamentally unfair" as the result of judicial rulings. Whether the governmental actor responsible for the infringement is a legislature or a court is irrelevant; the essential stability is no less undermined by seven justices in a courtroom than by a legislature in session. The judicial decision imposing retroactive liability here is little different in substance than the federal statute imposing retroactive liability in *Eastern Enterprises* – except that the decision here was *worse* from a due process perspective, because it was *entirely unforeseeable* when the nullified contractual provisions were agreed to by the parties. In *Eastern Enterprises*, this Court invalidated a federal law imposing several millions of dollars of mineworkers' benefits liability on a coal company for events that took place 35 years earlier. The plurality reasoned: "The distance in the past that the Act reaches back to impose liability on Eastern and the magnitude of that liability raise substantial questions of fairness." *Eastern Enterprises*, 524 U.S. at 534. Although the plurality addressed the problem under the Takings Clause, *see id.* at 533, Justice Kennedy's concurrence – which reflected his decisive fifth vote – explained the same problem in terms of the Due Process Clause, finding a violation of the Clause because "in creating liability for events which occurred 35

years earlier the Coal Act has a retroactive effect of unprecedented scope." *Id.* at 549. And both Justice Kennedy and the four-Justice plurality recognized that while Congress might well have a legitimate interest in resolving "the problem of funding miners' benefits," "the Constitution does not permit a solution to [that] problem . . . that imposes such a disproportionate and severely retroactive burden upon Eastern." *Id.* at 536 (plurality).

So it is here. The decision in this case would fundamentally rework transactions closed between 19 and 27 years ago. In doing so it would impose millions of dollars in unexpected liability on one party to those transactions. While a state may have a legitimate interest in ensuring adequate funds for environmental cleanup, its supreme court cannot accomplish this goal by imposing disproportionate and severely retroactive burdens on insurers who took care to negotiate with their highly sophisticated insureds very specific and unambiguous limits on their liabilities for such cleanup.

The decision below is an affront to the most fundamental premise of the Due Process Clause – that whatever process a party may receive, it will in all events be due process *of law*. The decision below is not law – it is straight confiscatory policymaking. If the New Jersey Legislature had attempted such an act, no court would have allowed it. The fact that a court itself has attempted it does not mitigate, but exacerbates, the constitutional harm. It certainly cannot immunize the act from constitutional review. Certiorari should be granted.

II. THE DECISION BELOW VIOLATES THE TAKINGS CLAUSE

The New Jersey Supreme Court's retroactive imposition of liability on Liberty also violates the Takings Clause, U.S. Const. amend V, for essentially the same reasons it violates due process. "The aim of the [Takings] Clause is to prevent the government 'from forcing some people alone to bear

public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Eastern Enterprises*, 524 U.S. at 522 (plurality opinion) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). That is exactly what the decision below does. As the *Eastern Enterprises* plurality explained, governmental action constitutes an impermissible Taking "if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Eastern Enterprises*, 524 U.S. at 528-29. That test is easily met here: as discussed above, the liability imposed is "severe," it is "retroactive," it is imposed on a "limited class of parties," it "could not have [been] anticipated," and it is "substantially disproportionate to the parties' experience" – which experience, after all, was to negotiate the very liability limitation the decision nullifies.

Certiorari should be granted to rectify the grossly unfair taking of Liberty's property effected by the retroactive imposition of millions of dollars of unforeseeable liability on Liberty.

III. THE DECISION BELOW CONFLICTS WITH OTHER DECISIONS ENFORCING INSURANCE CONTRACTS CONSISTENT WITH THEIR LANGUAGE

It should come as no surprise that the decision below conflicts with decisions of other state courts of last resort holding that contracts, including insurance contracts, must be enforced according to their terms, unless those terms are unconscionable or unlawful. Indeed, decisions from every jurisdiction in the United States have made clear that it is not even within the judicial *power*, as that power is understood in our system of law, to rewrite the unambiguous terms of private contracts, barring fraud, unconscionability, or some other form of illegality in the agreement. "The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or distort, under the guise of con-

struction, contracts, the terms of which are plain and unambiguous." *Hardee v. Hardee*, 585 S.E.2d 501, 503 (S.C. 2003).[8]

This principle of course applies fully to insurance contracts. As the Michigan Supreme Court recently observed in refusing to deviate from the terms of an insurance policy, it is a "bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Wilkie v. Auto-Owners Ins. Co.*, 664 N.W.2d 776, 782 (Mich. 2003). A "highly unusual circumstance" is not a court's professed interest in promoting pollution cleanup in disregard of the terms of private contracts. In direct contrast with the New Jersey Supreme Court in this case, the Michigan court recognized the constitutional dimension of the requirement that insurance contracts must be enforced according to their terms:

> The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from our common-law roots and can be seen in our fundamental charter, the United States Constitution,

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[8] The principle that courts lack authority under our system of law to disregard the lawful, unambiguous terms of private contracts is so well settled that a complete list of citations endorsing it would be impossible to include in any brief. In addition to the cases cited in the text, the following decisions from state courts of last resort on this point were reported in just the last few months: *Elliott v. Darwin Neibur Farms*, 69 P.3d 1035, 437 (Idaho 2003); *Yarcheski v. Reiner*, 669 N.W.2d 487, 495 (S.D. 2003); *Alpine Haven Property Owners Ass'n, Inc. v. Deptula*, 830 A.2d 78, 86 (Vt. 2003); *Standard Banner Coal Corp. v. Rapoca Energy Co.*, 576 S.E.2d 435, 437 (Va. 2003); *Hertz v. Clovis*, 578 S.E.2d 391, 395 (W. Va. 2003); *Columbia Propane, L.P. v. Wisconsin Gas Co.*, 661 N.W.2d 776, 783 (Wis. 2003).

> where government is forbidden from impairing the obligation of contracts of citizens, art. I, § 10, cl. 1. . . . It is, in short, an unmistakable and ineradicable part of the legal fabric of our society.

Id. at 782. Other state supreme court decisions have similarly recognized that, in our constitutional system, courts "do not rewrite any provision of any contract, including an insurance policy, for any purpose." *Rosen v. State Farm Gen. Ins. Co.*, 70 P.3d 351, 353 (Cal. 2003) (alterations omitted); *see, e.g., Aerojet-General Corp. v. Transport Indemnity Co.*, 948 P.2d 909 (Cal. 1997); *Medlar v. Aetna Ins. Co.*, 248 A.2d 740, 747 (Vt. 1968).

Rosen is especially on point. In that case, the insured made a claim for the cost of repairing two decks, which had been in a state of imminent collapse, despite the fact that coverage under the policy was expressly restricted to actual collapse. The California Supreme Court rejected the argument that notwithstanding the language of the collapse provision in the insurance contract, public policy mandated that the insurer afford coverage:

> Applying the same logic, with the same lack of restraint, courts could convert life insurance into health insurance. In rewriting the coverage provision to conform to their notions of sound public policy, the trial court and the Court of Appeal exceeded their authority, disregarding the clear language of the policy and the equally clear holdings of this court.

Rosen 70 P.3d at 355. In so ruling, the court drew an analogy to earlier rulings addressing coverage for environmental cleanup in which the court had recognized that "[w]hile we agree that it is in everyone's best interests to have hazardous wastes cleaned up, we do not agree that a California court may rewrite an insurance policy for that purpose or for any purpose." *Id.* at 356 (citations omitted).

The decision of the New Jersey Supreme Court in this case cannot be reconciled with these other decisions, or with the deeply embedded constitutional principle they endorse.

IV. THIS CASE IS EXTREMELY IMPORTANT TO INSURERS AND INSUREDS IN NEW JERSEY AND ELSEWHERE

This case is not a minor or commonplace contractual dispute between insurer and insured. The decision below alone means the difference between $1 million and $8.5 million in potential liability for Liberty. But there is much more to it than that. Non-cumulation clauses are a commonplace feature of Liberty's policies. Because no court had ever suggested that such clauses are simply void, for literally decades Liberty sold policies to insureds in New Jersey that included this important cap on Liberty's potential liability. The decision below nullifies the coverage limitation – the essence of the bargain – in every one of those contracts as it applies in continuous injury situations. Potentially scores of millions of dollars are at stake.

This Court has previously acknowledged the enormous costs and virtually inherent unfairness of retroactive insurance liability:

> [I]nsurance depend[s] on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect.

City of Los Angeles v. Manhart, 435 U.S. 702, 721 (1978). *Manhart* involved the retroactive application of a federal re-

regulatory statute affecting insurance funds, not a statute or court decision retroactively nullifying a fundamental liability limitation in an insurance contract. But its recognition of the inequities and hidden costs of imposing retroactive insurance liability of any kind is directly applicable here.

The costs and unfairness do not affect Liberty alone. Non-cumulation clauses are not provisions secretly or uniquely devised by Liberty. They are a commonplace feature of policies sold by many other insurers as well. The court below well understood that it was not imposing a special burden on Liberty alone – it was tapping the resources of every insurer with a policy in New Jersey limiting its liability over successive contracts. The more coverage, the better, the court explicitly held.

In short, the Due Process Clause and Takings violation that occurred here will not affect just this one insurer in this one case. It will affect many other insurers in many other cases. The retroactive effect of the law across the industry will be enormous.

This case is thus an appropriate vehicle through which to remind state courts that, while the common law may be capable of evolving, at bottom courts must always remain courts *of law*. Review and reversal here need not draw this Court into endless battles over claimed error in state-law contractual disputes. As we have explained, the error here is of a qualitatively different kind: whether or not the court below was correct in its reading of prior precedents, what cannot be disputed is that the decision (1) nullifies an unambiguous contractual provision, (2) does so retroactively, and (3) in a manner that was wholly unforeseeable at the time, now more than twenty years ago, that the contracts were entered into. The asserted error, in other words, is not one of state law; indeed it is just the opposite. Liberty does not dispute that the New Jersey Supreme Court, as the final arbiter of New Jersey state law, is entitled to interpret contracts in accordance with its well-settled principles of contract inter-

pretation. But an approach in which judges divine a public policy and then rewrite contracts made years earlier is antagonistic to due process of law. If New Jersey law allows a court to refuse to enforce an unambiguous insurance liability limitation simply to increase the insurance dollars available for environmental cleanup, then application of that New Jersey law to Liberty deprives Liberty of due process and takes its property without just compensation.

Because it is the rare court that departs so fundamentally from the basic precepts of law that govern all courts, it is the rare petition for certiorari in a contract dispute, otherwise governed by state law, that presents – or ever would present – a meritorious federal constitutional claim. Recognition of that claim here thus would ultimately have the salutary effect of minimizing the number of petitions claiming such error, for reversal of the decision below would serve as a potent reminder to all state courts that they must continue, as they largely have for centuries, to respect the boundaries of their critically important role as arbiters of law in our constitutional order.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX A

Supreme Court of New Jersey.

SPAULDING COMPOSITES COMPANY, INC., Plaintiff,
and
Caldwell Trucking PRP Group, Interested Party-Appellant,
v.
AETNA CASUALTY AND SURETY COMPANY, Allstate Insurance Company, as successor to Northbrook Insurance Company, American Centennial Insurance Company, American Home Insurance Company, Employers Insurance of Wausau, Greenwich Insurance Company, as successor to Harbor Insurance Company, Certain Underwriters at Lloyd's of London, Certain London Market Companies, New England Reinsurance Corporation, New Jersey Property-Liability Insurance Guaranty Association and John Doe Insurance Companies 1 Through 50, Defendants,
and
Industrial Underwriters Insurance Company, Liberty Mutual Insurance Company, Lexington Insurance Company, and National Union Fire Insurance Company of Pittsburgh, PA, Defendants-Respondents.

Argued Sept. 24, 2002.
Decided April 10, 2003.

Judgement of the Appellate Division reversed; grant of summary judgment reinstated.

Peter J. Herzberg, Morristown, argued the cause for appellant (Pitney, Hardin, Kipp & Szuch, attorneys; Mr. Herzberg and Kathy Dutton Helmer, on the brief).

John C. Sullivan, argued the cause for respondent Liberty Mutual Insurance Company (Klett Rooney Lieber &

Schorling and Post & Schell, attorneys; Thomas B. O'Brien, Jr. and Joseph B. Silverstein, Philadelphia, PA, on the briefs).

Martin P. Lavelle, New York City, argued the cause for respondents National Union Fire Insurance Company of Pittsburgh, PA, and Lexington Insurance Company.

Jerrald J. Hochman, Cherry Hill, argued the cause for respondent Industrial Underwriters Insurance Company (Siegal & Napierkowski, attorneys).

Gita F. Rothschild, Newark, submitted a brief on behalf of amici curiae G.A.F. Materials Corporation, R & F Alloy Wire and N.J.C. Holdings, Inc. (McCarter & English, attorneys; Alissa Pyrich and Gregory H. Horowitz, on the brief).

Wendy L. Mager, Princeton, submitted a brief on behalf of amicus curiae Complex Insurance Claims Litigation Association (Smith, Stratton, Wise, Heher & Brennan, attorneys).

The opinion of the Court was delivered by

LONG, J.

In this appeal, we revisit the "continuous trigger" and "pro rata allocation" doctrines we adopted to address complex environmental insurance coverage issues in *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437, 650 A.2d 974 (1994). More particularly, we have been asked how those principles affect the validity of a "non-cumulation" clause in a comprehensive general liability policy that is invoked by an insurer to restrict its exposure on nine years of coverage to a single policy limit. We hold that the rules enunciated in *Owens-Illinois* and reaffirmed in *Carter-Wallace, Inc. v. Admiral Ins. Co.*, 154 N.J. 312, 712 A.2d 1116 (1998) preclude enforcing such a limitation.

I

The facts of the case are detailed in the decision of the Appellate Division and are incorporated herein as if more fully set forth. 346 N.J. Super. 167, 787 A.2d 238 (2001). We recite only those necessary to our disposition.

Spaulding Composites Company, Inc. (Spaulding) purchased $678 million in comprehensive general liability (CGL) insurance between 1967 and 1984. Nine of those policies were issued by Liberty Mutual Insurance Company (Liberty) during the period from 1976 to 1984. The 1976 policy had a $500,000 limit and the other eight each had a $1 million limit. During those nine years in which Liberty was Spaulding's primary insurer, Spaulding also purchased excess liability in amounts varying from $23 million to $100 million.

Each of Liberty's nine CGL policies contained the identical non-cumulation clause that provided:

> PERSONAL INJURY LIABILITY AND PROPERTY DAMAGE LIABILITY
>
> (A) The limit of liability stated in the schedule as applicable to 'each *occurrence*' is the total limit of the company's liability for all damages because of *personal injury* or *property damage* as a result of any one occurrence.
>
> . . . .
>
> (C) For the purpose of determining the limit of the company's liability, all *personal injury* and *property damage* arising out of continuous or repeated exposure to substantially the same general conditions shall be construed as arising out of one occurrence.
>
> (D) If the same occurrence gives rise to *personal injury* or *property damage* which occurs partly before and partly within the policy period, the '*each occurrence*'

limit and the applicable aggregate limit of this policy shall be reduced by the amount of each payment made by the company with respect to such *occurrence* under a previous policy of which this policy is a replacement.

[(Emphasis added).]

In 1990, the United States Environmental Protection Agency (EPA) identified Spaulding as a potentially responsible party for disposing of hazardous lead- containing wastes at the Caldwell Trucking Company Superfund Site in Fairfield Township, New Jersey. In 1993, Spaulding declared bankruptcy. In 1994, Caldwell Trucking PRP Group (PRP) and the EPA each filed suit against Spaulding in the United States District Court alleging that Spaulding was responsible for cleanup costs at the Caldwell Trucking Superfund site. PRP initially joined Spaulding and its insurers, including Liberty, as direct defendants in the federal court suit seeking contribution to cover past and future costs of cleaning up the site. The district court dismissed PRP's claims against Liberty and the excess insurers on the ground that PRP did not have a right to bring a direct cause of action against the insurers. *Caldwell Trucking PRP Group v. Spaulding Composites Co.,* 890 F. Supp. 1247, 1256 (D.N.J.1995).

PRP's federal action against Spaulding continued, and in 1996 the district court granted PRP partial summary judgment on the issue of Spaulding's liability for an undetermined amount of the costs incurred by PRP to clean up the Caldwell Trucking Superfund site. *Caldwell Trucking PRP Group v. Spaulding Composites Co.,* Civ. No. 94-3531, 1996 WL 608490, at *14 (D.N.J. Apr.22, 1996). The lone issue that remained in the federal litigation was the amount of damages owed by Spaulding to PRP and the EPA for the site cleanup. In 1999, the district court ordered Spaulding, Liberty, the EPA, and PRP into mediation to decide the amount of coverage Liberty would provide under the CGL

policies. That effort proved unsuccessful and was abandoned in late 1999. We were informed at oral argument that judgments of liability have been entered against Spaulding in favor of PRP and the EPA totaling over $13 million, and the matter is now before the Third Circuit Court of Appeals.

In the interim, in 1995, Spaulding began this state court action seeking a declaratory judgment regarding insurance coverage in respect of its share of the defense and remediation costs at the Caldwell Trucking Superfund site. Spaulding moved for summary judgment against its insurers, including Liberty. PRP joined in the motion, which the trial court granted. In ruling, the trial court recognized that *Owens-Illinois* had adopted the continuous trigger theory warranting the treatment of sequential environmental damage as a separate occurrence "within each of the years of a CGL policy." (quoting *Owens-Illinois, supra,* 138 N.J. at 478, 650 A.2d 974). Because the non- cumulation clause is intended to govern cases involving a single occurrence causing damage over multiple years, the trial court held it to be "inapplicable as a matter of law."

The Appellate Division granted Liberty's motion for leave to appeal and reversed the summary judgment in favor of Spaulding and PRP, declaring the non- cumulation clause both clear and effective. *Spaulding Composites Co. v. Liberty Mut. Ins. Co.,* 346 N.J. Super. 167, 171, 787 A.2d 238 (2001). In so doing, the panel distinguished *Owens-Illinois* and *Carter-Wallace* on the basis that the CGL policies at issue in those cases were ambiguous. In effect, the panel held that *Owens-Illinois* and *Carter-Wallace* merely provided an interpretative rationale in cases involving unclear insurance contract language. *Spaulding Composites, supra,* 346 N.J. Super. at 178, 787 A.2d 238. The court also rejected Spaulding's argument that the non- cumulation clause is an invalid "other-insurance" or "escape" clause and

remanded the matter for the entry of partial summary judgment in favor of Liberty. *Id.* at 179-80, 787 A.2d 238.

Spaulding and PRP moved for leave to appeal. Several industrial insureds including GAF, R & F Alloy Wire, and NJC Holdings (collectively, the GAF *Amici*) were granted leave to appear as *amicus curiae,* as was the Complex Insurance Claims Litigation Association. The excess carriers filed protective answers to the motion for leave to appeal, taking no position concerning the enforceability and applicability of the non-cumulation clauses but seeking to preserve their rights to challenge PRP's characterization of their liability in this action if the court, *sua sponte,* considered the issue of allocation, which had not been raised below and was not determined by the trial court. In 2002, Spaulding assigned all of its rights to coverage from Liberty and its excess insurers to PRP. We granted PRP's motion for leave to appeal on March 19, 2002, *Spaulding Composites Co. v. Liberty Mut. Ins. Co.,* 171 N.J. 439, 794 A.2d 178 (2002), and now reverse.

II

To understand the issue in this case, *Owens-Illinois* and *Carter- Wallace* require explication.

A.

From 1948 to 1958, Owens-Illinois was the manufacturer of asbestos products including "Kaylo." *Owens-Illinois, supra,* 138 N.J. at 442-43, 650 A.2d 974. Many plaintiffs filed lawsuits against the company alleging personal injury and property damage arising out of the use of Kaylo. *Id.* at 444, 650 A.2d 974.

Over the years, the company maintained substantial CGL coverage in primary and excess layers. *Id.* at 443-44, 650 A.2d 974. CGL policies provide coverage to third persons who suffer bodily injury or property damage. Unlike claims or suits that are presented on a date certain and unlike most

corporate conduct that generally also may be confined to a single policy period, the bodily injury or property damage against which the CGL policy protects may be sustained by the claimant over an extended period of time. Donald C. Erickson, *Emerging Primary and Excess Coverage Issues in Continuous Trigger Regimes,* 28 Brief 18, 18 (Summer 1999). A coverage dispute arose between the company and its insurers. *Owens-Illinois, supra,* 138 N.J. at 444-45, 650 A.2d 974. More particularly, the issue was which of the insurance policies in effect from 1977 to 1985 provided indemnity to Owens- Illinois and in what amount. *Id.* at 446, 650 A.2d 974. Two aspects of the dispute required resolution: the first was the trigger for coverage; the second, allocation among triggered policies. *Id.* at 441, 650 A.2d 974.

The CGL policies at issue in *Owens-Illinois* provided coverage for property damage or bodily injury that "occurs" during the policy period. *Id.* at 447, 650 A.2d 974. We found no ambiguity in the language of the occurrence clause. "The words are all familiar and easily understandable." *Id.* at 457, 650 A.2d 974. Nevertheless, we recognized that resort to policy language and traditional rules of insurance contract interpretation would be inadequate to the task of answering when an occurrence takes place in an environmental exposure case.

> Our concepts of legal causation were developed in an age of Newtonian physics, not of molecular biology. Were it possible to know when a toxic substance clicks on a switch that alters irrevocably the composition of the body and before which no change has occurred, we might be more confident that occurrence-causing damages had taken place during a particular policy period. The limitations of science in that respect only compound the limitations of law.

Mass-exposure toxic-tort cases have simply exceeded the

> capacity of conventional models of judicial response.
>
> The overwhelming conclusion of the commentators who have evaluated the result is that ... common-law tort doctrines are ill-suited to the resolution of such injury claims, and that some form of statutorily-authorized compensation procedure is required if the injuries sustained by victims of chemical contamination are to be fairly redressed.
>
> No such procedure has been forthcoming. Hence, courts must adapt common-law doctrines to the peculiar characteristics of toxic-tort litigation.
>
> [*Id.* at 458-59, 650 A.2d 974 (internal citations and quotation marks omitted).]

We went on to evaluate various theories potentially applicable to an environmental claim including the exposure theory[1], the manifestation theory[2] and the continuous trigger theory, among others. *Id.* at 449-51, 650 A.2d 974.

Ultimately, we abandoned as "hopeless" the task of attempting to define the particular point that is the occurrence in the long-tail injury process. Rebecca M. Bratspies, *Splitting the Baby: Apportioning Environmental Liability Among Triggered Insurance Policies,* 1999 BYU L. Rev. 1215, 1230 (1999). Taking our cue from the seminal decision of *Keene Corp. v. Insurance Co. of N. Am.,* 667

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[1] The exposure theory holds that the date of occurrence is that on which the injury-producing agent first contacts the body. *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.,* 633 F.2d 1212, 1217 (6th Cir.1980), *clarified on reh'g,* 657 F.2d 814 (6th Cir.), *cert. denied,* 454 U.S. 1109, 102 S. Ct. 686, 70 L.Ed.2d 650 (1981).

[2] The manifestation theory provides that injury resulting from environmental exposure does not occur until the disease manifests itself. *Eagle-Picher Indus. v. Liberty Mut. Ins. Co.,* 682 F.2d 12, 16 (1st Cir.1982), *cert. denied,* 460 U.S. 1028, 103 S. Ct. 1279, 75 L.Ed.2d 500 (1983).

F.2d 1034 (D.C. Cir.1981) (holding that because asbestos-related disease develops slowly, date of occurrence should be continuous period from exposure to manifestation), *cert. denied,* 455 U.S. 1007, 102 S. Ct. 1644, 71 L.Ed.2d 875 (1982), we adopted the continuous trigger theory that states:

> [W]hen progressive indivisible injury or damage results from exposure to injurious conditions for which civil liability may be imposed, courts may reasonably treat the progressive injury or damage as an occurrence within each of the years of a CGL policy. That is the continuous-trigger theory for activating the insurers' obligation to respond under the policies.
>
> [*Owens-Illinois, supra,* 138 N.J. at 478-79, 650 A.2d 974.]

In so doing, we joined a growing number of states that have adopted the continuous trigger theory.[3]

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[3] *See Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.,* 210 F.3d 672, 689-90 (6th Cir.2000) (predicting that Ohio Supreme Court would adopt flexible "continuing injury" trigger, which creates rebuttable presumption that all policies in effect from exposure to manifestation triggered); *Arrow Exterminators, Inc. v. Zurich Am. Ins. Co.,* 136 F. Supp. 2d 1340, 1349 (N.D. Ga. 2001) (concluding that where contract defines "occurrence" as including "continuous or repeated exposure" appropriate trigger is continuous); *GenCorp, Inc. v. AIU Ins. Co.,* 104 F. Supp. 2d 740, 749 (N.D. Ohio 2000) (holding continuous trigger applicable when environmental contamination claimant is able to show damage, like asbestosis, occurred on continuing basis); *Harleysville Mut. Ins. Co. v. Sussex County, Del.,* 831 F. Supp. 1111, 1124 (D. Del.1993) (applying Delaware law finding "slow leaching of pollutants from a landfill to adjacent property" constitutes progressive injury requiring use of continuous trigger theory), *aff'd,* 46 F.3d 1116 (3d Cir. 1994); *Broderick Inv. Co. v. Hartford Accident & Indem. Co.,* 742 F. Supp. 571, 573 (D. Colo.1989) (adopting continuous trigger method and finding each policy issued during period that damage occurred was triggered), *rev'd on o.g.,* 954 F.2d 601 (10th Cir.), *cert. denied,* 506 U.S. 865, 113 S. Ct. 189, 121 L.Ed.2d 133 (1992); *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.,* 662 F. Supp. 71, 76 (E.D. Mich.1987) (recognizing similarity

Concerning the methodology for dividing responsibility among multiple triggered policies, we unequivocally recognized the conjunction between the continuous trigger and how allocation ultimately would take place:

> [W]e believe that common-law resolution of the trigger-of-coverage issue requires that we consider, at the same time, the issue of scope of coverage if a policy is triggered. "[T]he choice of trigger theory is related to the method a court will choose to allocate damages between insurers."

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between asbestos claims and hazardous waste claims and holding that continuous trigger theory implicates "each exposure of the environment to a pollutant"); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir.1981) (holding that because asbestos-related disease develops slowly, date of occurrence should be continuous period from exposure to manifestation), *cert. denied,* 455 U.S. 1007, 102 S. Ct. 1644, 71 L.Ed.2d 875 (1982); *Montrose Chem. Corp. v. Admiral Ins. Co.,* 10 Cal. 4th 645, 42 Cal. Rptr. 2d 324, 913 P.2d 878, 880 (1995) (concluding "continuous injury" trigger should be adopted for third party liability insurance cases involving continuous or progressively deteriorating losses); *American Employer's Ins. Co. v. Pinkard Constr. Co.,* 806 P.2d 954, 956 (Colo. Ct. App.) (holding that because corrosion was progressive and continuous condition, each policy issued during period that damage occurred was triggered), *cert. dismissed,* 831 P.2d 887 (Colo.1991); *Sentinel Ins. Co. v. First Ins. Co.,* 76 Hawaii 277, 875 P.2d 894, 917 (1994) (remarking that continuous injury trigger may be employed to apportion equitably liability among insurers); *United States Gypsum Co. v. Admiral Ins. Co.,* 268 Ill. App. 3d 598, 205 Ill. Dec. 619, 643 N.E.2d 1226, 1257 (1994) (applying continuous trigger theory to asbestos-related property damage claims), *appeal denied,* 161 Ill. 2d 542, 208 Ill. Dec. 370, 649 N.E.2d 426 (1995); *J.H. France Refractories Co. v. Allstate Ins. Co.,* 534 Pa. 29, 626 A.2d 502, 507 (1993) (holding all stages of asbestosis disease process, between initial exposure until recognizable incapacitation, as bodily injury sufficient to trigger insurers' obligation to indemnify); *Wisconsin Elec. Power Co. v. California Union Ins. Co.,* 142 Wis. 2d 673, 419 N.W.2d 255, 258 (Ct. App. 1987) (holding that event triggering insurance policies began with installation of faulty power supply system and continued until problem was resolved), *review denied,* 142 Wis.2d 954, 419 N.W.2d 563 (1988).

[*Id.* at 459, 650 *A.*2d 974 (citing *Northern States Power Co. v. Fidelity & Cas. Co. of N.Y.*, 523 N.W.2d 657, 662 (Minn. 1994)).]

We went on to explore various approaches including joint and several and pro rata allocation. Diverging from *Keene,*

> [w]e rejected joint-and-several allocation, [*Owens-Illinois, supra,*] 138 N.J. at 468, 650 A.2d 974, a theory under which the problem of indivisible injury is resolved simply by collapsing the continuous injury into one year. Joint-and-several allocation effectively allows a policyholder to simply select one triggered year and exhaust the coverage provided during that period in satisfaction of its claim, *id.* at 459-62, 650 A.2d 974, requiring the insurers to sue each other for contribution. We determined that such an approach rested on an assumption not in accordance with the development of the law: "that at every point in the progression the provable damages due to injury in any one of the years from exposure to manifestation will be substantially the same...." *Id.* at 468, 650 A.2d 974. We also considered the effect on the allocation issue of "other insurance" clauses, which are provisions typically designed to preclude a double recovery when multiple, concurrent policies provide coverage for a loss. We determined that such clauses were not generally applicable in the continuous-trigger context where successive rather than concurrent policies were at issue. *Id.* at 470, 650 A.2d 974. In sum, we found the contract language and the traditional rules of interpretation to be unhelpful in settling on the proper method of allocating responsibility. *Id.* at 468-71, 650 A.2d 974.

Rather, our resolution of the issue was guided by our concern for the efficient use of resources to address the problem of environmental disease and by the demands of

simple justice. *Id.* at 472-73, 650 A.2d 974.

[*Carter-Wallace, supra,* 154 N.J. at 321-22, 712 A.2d 1116.]

Instead, we adopted what is called a pro-ration by years and limits method of allocation. We stated that

"any allocation should be in proportion to the degree of the risks transferred or retained during the years of exposure," and concluded that the "better formula" was to "allocate[ ] the losses among the carriers on the basis of the extent of the risk assumed, *i.e.,* proration on the basis of policy limits, multiplied by years of coverage."

[*Carter-Wallace, supra,* 154 N.J. at 322, 712 A.2d 1116 (citing *Owens- Illinois, supra,* 138 N.J. at 475, 650 A.2d 974 (citing *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.,* 20 Cal. App. 4th 296, 26 Cal. Rptr. 2d 35, 57 (1993))).]

Put another way,

[t]he basis of an individual insurer's liability is the aggregate coverage it underwrote during the period in which the loss occurred. Basically, a given insurer's liability is determined by comparing its particular exposure to the total amount of exposure assumed by all carriers of the triggered policies. This comparison yields a percentage that is then applied to the amount of loss the policyholder sustained.

[Thomas M. Jones & Jon D. Hurwitz, *An Introduction to Insurance Allocation Issues in Multiple-Trigger Cases,* 10 Vill. Envtl. L.J. 25, 44-45 (1999).]

Under that scheme, the insured is required to pay its "aliquot" share of both defense and indemnification on account of years in which it was uninsured, self-insured, or its coverage was exhausted or bankrupt. Erickson, *supra,* 28 Brief at 20.

Ultimately, we declared that our choice of the pro-rata allocation method was rooted in the policy considerations that we identified: (1) maximizing resources to cope with environmental injury or damage; (2) giving the greatest incentive to insureds to acquire insurance; and (3) notions of simple justice. *Owens-Illinois, supra,* 138 N.J. at 472-73, 650 A.2d 974.

B.

Thereafter, in *Carter*-Wallace, in a case involving the results of pharmaceutical waste disposal, we were faced with the question of how the responsibility of primary and excess insurers[4] is measured in the context of environmental damage over many years with a continuous trigger of liability. 154 N.J. at 317, 712 A.2d 1116.

We reaffirmed the continuous trigger principle and held, as we had in *Owens-Illinois,* that the contract language in the CGL policy and traditional rules of insurance policy interpretation were inadequate to determine the proper method of allocation among primary, first and second level excess insurers. *Id.* at 325, 712 A.2d 1116. Again, our assessment was not based on ambiguity in the insurance policy, but on the inherent difficulty of attempting to fairly allocate liability coverage in a long-tail environmental exposure case. *Id.* at 322, 712 A.2d 1116.

The second level excess policy that was at issue in *Carter-Wallace* provided $1 million in coverage in excess of $5.1 million in underlying primary and first layer excess

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[4] Primary insurance provides first dollar liability coverage up to the limits of the insurance contract, usually subject to a deductible. It potentially attaches upon the happening of an insured liability. Scott M. Seaman & Charlene Kittredge, *Excess Liability Insurance: Law and Litigation,* 32 Tort & Ins. L.J. 653, 655 (1997). Excess insurance is secondary coverage that ordinarily attaches only after a predetermined amount of primary insurance or self-insured retention has been exhausted. *Id.* at 656.

coverage. *Id.* at 319, 712 A.2d 1116. In addition, condition J of the policy was an exhaustion clause that provided in pertinent part that "[l]iability under this policy with respect to any occurrence shall not attach unless and until the insured, or the insured's underlying insurer, shall have paid the amount of the underlying limits on account of such occurrence." *Ibid.*

Although there was nothing unclear about that provision, we rejected the excess insurers' horizontal exhaustion theory that stated that all primary and first layer excess policies in effect throughout the seventeen-year trigger period had to be exhausted prior to any second layer excess liability attaching. *Id.* at 324, 712 A.2d 1116. We also rejected the insured's proposal that the entire loss should be collapsed into a single year so that the excess layer would be reached. *Id.* at 325, 712 A.2d 1116.

Instead, we opted for an allocation method we characterized as "more faithful" to the principles articulated in *Owens-Illinois. Ibid. Citing* Chemical Leaman Tank Lines v. Aetna Cas. & Sur. Co., 978 F. Supp. 589 (D.N.J. 1997), *rev'd on o.g.*, 177 F.3d 210 (3d Cir. 1999), we adopted a vertical loss allocation by year. Carter-Wallace, supra, 154 N.J. at 326- 27, 712 A.2d 1116. Thus, for example, if in a given year primary coverage was $100,000, first-level excess, $200,000 and second-level excess $450,000, and the pro-rata loss allocated to that year was $325,000, "the primary insurer would pay $100,000, the first-level excess policy would be responsible for $200,000, and the second-level excess policy would pay $25,000." Ibid. In other words, the model consists of a horizontal axis made up of the number of years during which damages occurred and a vertical axis containing the pro-rata damages assigned to a specific year. Under that scheme, after pro-ration of damages horizontally, the policies implicated in each particular year are exhausted vertically. Accordingly,

the primary policy in a particular year answers until its limits are exhausted, then the first-level excess policy answers until its limits are exhausted and the vertical exhaustion scheme continues until all of the damages assigned to the particular year are covered or all of the insurance policies' limits are exhausted, whichever occurs first.

Echoing the policy considerations relied on in *Owens-Illinois,* we stated:

> [T]his approach makes efficient use of available resources because it neither minimizes nor maximizes the liability of either primary or excess insurance, thereby promoting cost efficiency by spreading costs. That method also promotes simple justice, by respecting the distinction between primary and excess insurance while not permitting excess insurers unfairly to avoid coverage in long-term, continuous-trigger cases. Additionally, adoption of that allocation method will introduce a degree of certainty and predictability into the complex world of environmental insurance litigation in continuous- trigger cases.
>
> ....
>
> [W]e anticipate that the principles of *Owens-Illinois,* as clarified by our decision today, represent the presumptive rule for resolving the allocation issue among primary and excess insurers in continuous trigger liability cases unless exceptional circumstances dictate application of a different standard.
>
> [*Carter-Wallace, supra,* 154 N.J. at 327-28, 712 A.2d 1116 (internal citations and quotation marks omitted).]

See also Quincy Mut. *Fire Ins. Co. v. Borough of Bellmawr,* 172 N.J. 409, 419, 799 A.2d 499 (2002) (observing that "[o]ur decision in *Owens-Illinois* was compelled by important public policy considerations, including the need to adapt our tort law to the peculiarities of

mass-exposure tort cases").

III

PRP argues that the Appellate Division erred in enforcing the non-cumulation clause because it is inapplicable when a separate occurrence takes place in each year of successive CGL policies, because it is an invalid other-insurance or escape clause, and because it effectively circumvents the continuous trigger and allocation model adopted in *Owens-Illinois.*

The GAF *Amici* echo that argument, contending that the allocation methodology established in *Owens-Illinois* and *Carter-Wallace* is incompatible with Liberty's non-cumulation clause and that the policy interests underpinning those decisions would be undermined if insurers could contract away their risk through like clauses.

Liberty counters that the Appellate Division's decision does not disturb either *Owens-Illinois* or *Carter-Wallace,* that the claim against Spaulding derived from a single occurrence thus reducing Liberty's liability to a single year of coverage, and that other courts have found similarly worded non- cumulation clauses unambiguous and enforceable.

The Complex Claims Litigation Association *amicus* sides with Liberty and argues in favor of the Appellate Division decision. In essence, it urges enforcement of what it characterizes as an unambiguous non-cumulation clause in order to give the insurer and the policyholder "what they bargained for."

IV

As scholars and treatise writers, without exception, have concluded, *Owens- Illinois* was a "watershed" in the cripplingly complex area of long-tail environmental exposure insurance coverage. Erickson, *supra,* 28 Brief at 20; *see* Jones & Hurwitz, *supra,* 10 Vill. Envtl. L.J. at 45

(*Owens- Illinois* is "seminal" case adopting "pro-ration by years and limits"); Barbara Hopkinson Kelly & Colin P. Hackett, *Environmental Insurance Coverage Claims and Litigation: Trends and Emerging Coverage Issues,* 718 PLI/ Comm 99, 123 (PLI Comm. Law & Practice Course Handbook Series No. A4-4477, May-June 1995) (stating that *Owens-Illinois* decision is "significant" and should be persuasive authority in other jurisdictions addressing environmental contamination cases involving trigger and allocation issues); Michael A. Orlando *et al.,* Recent Developments in Insurance Coverage Litigation, 34 Tort & Ins. L.J., 481, 498 (1999) (*Owens-Illinois* regarded as "landmark" decision).

What made *Owens-Illinois* so important is that it looked beyond contract language and traditional rules of insurance policy interpretation to develop a fair and uniform methodology for addressing complex environmental insurance coverage issues. Bratspies, *supra,* 1999 BYU L. Rev. at 1236; Erickson, *supra,* 28 Brief at 21; Garrett G. Gillespie, Note, *The Allocation of Coverage Responsibility Among Multiple Triggered Commercial General Liability Policies in Environmental Cases: Life After Owens-Illinois,* 15 VA. Envtl. L.J. 525, 550-52 (1996). Specific policy goals are at the heart of that methodology, including maximization of resources available for environmental cleanup; creating incentives for the purchase of insurance; and notions of simple justice. Barry R. Ostrager & Thomas R. Newman, *Handbook on Ins. Coverage Disputes* § 9.04 (9th ed.1998); Erickson, *supra,* 28 Brief at 21; Jones & Hurwitz, *supra,* 10 Vill. Envtl. L.J. at 45-46; Joren S. Bass, Note, *The Montrose Decision and Long-Tail Environmental Liability: A New Approach to Allocating Risk Among Multiple Third-Party Insurers,* 5 Hastings W.- Nw. J. Envtl. L. & Pol'y 209, 220 (1999); Gillespie, *supra,* 15 VA. Envtl. L.J. at 573-77 (1996).

To achieve those goals, *Owens-Illinois* declared that long-tail environmental exposure injury and damage would no longer be treated as one continuous occurrence, giving rise to joint and several liability by each insurer up to the full limit of its policy (with the policyholder or injured party choosing which year's policy would pay all the damages), but would be treated as one occurrence per year triggering all applicable policies, allocated pro rata, based on the degree of risk assumed. *Owens- Illinois, supra,* 138 N.J. at 478-79, 650 A.2d 974. The intent of *Owens- Illinois* in changing the allocation method among insurers was to find a fairer way to divide the damages among all the insurers whose policies provide coverage. Kelly & Hackett, *supra,* 718 PLI/Comm at 124-26; Orlando *et al., supra,* 34 Tort & Ins. L.J. at 498; Seaman & Kittredge, *supra,* 32 *Tort & Ins. L.J.* at 680. Integral to the scheme was the devolution of a portion of liability upon insureds for time periods in which they chose to "go bare" or self-insure. Ostrager & Newman, *supra,* § 9.04; Bratspies, *supra,* 1999 BYU L. Rev. at 1236-37; Bass, *supra,* 5 Hastings W.-Nw. J. Envtl. L. & Pol'y at 220; Gillespie, *supra,* 15 VA. Envtl. L.J. at 549.

As legal writers have recognized, it is obvious that *Owens-Illinois* did not simply provide an interim measure calculated to fill in an ambiguous policy provision. Indeed, we noted that the policies were not ambiguous. *Owens-Illinois,* 138 N.J. at 457, 650 A.2d 974. What made their language "unhelpful" was the difficulty inherent in trying to allocate insurance coverage in long- tail environmental exposure cases. That, in turn, created the need for an entirely different approach to environmental exposure coverage issues because "traditional techniques of contract interpretation cannot produce a coherent result." *Id.* at 471, 650 A.2d 974 (citing Note, *Adjudicating Asbestos Insurance Liability: Alternatives to Contract Analysis,* 97 Harv. L. Rev. 739, 743 (1984)).

> [I]n *Owens-Illinois,* the New Jersey Supreme Court overturned well established New Jersey law.... [T]he court took an issue that had been addressed by many courts around the country and forged a wholly new answer.... [T]he court ignored traditional rules of insurance policy construction founded on contra [proferentum] and based its holding on considerations of public policy.
>
> [Gillespie, *supra,* 15 VA. Envtl. L.J. at 573 (quoting Robert B. Chesler & David A. Thomas, *New Jersey Insurance Law After Signo, Morton, Gilbert Spruance, and Owens-Illinois,* 9 Mealey's Litig. Rep. 18, 24 (Mealey ed.1995)).]

In a word, *Owens-Illinois* eliminated reliance on particular contract language (other than limits and exclusions) and on traditional rules of interpretation, and set forth a uniform standard for resolving allocation issues in long-tail environmental exposure cases. *See Carter-Wallace, supra,* 154 N.J. at 328, 712 A.2d 1116 (observing that principles of *Owens-Illinois,* as clarified by *Carter-Wallace,* represent "presumptive rule" for resolving allocation issue in continuous trigger liability cases unless "exceptional circumstances" dictate application of different standard). It did so because of "the need for courts to choose one method, and apply it consistently, when allocating liability for progressive injuries." *Ibid.* (quoting Comment, *Allocating Progressive Injury Liability Among Successive Insurance Policies,* 64 U. Chi. L. Rev. 257, 259 (1997)).

V

The question presented is whether the non-cumulation clause in Liberty's CGL policies can be enforced consonant with the rules we adopted in *Owens-Illinois* and affirmed in *Carter-Wallace.* The answer is that it cannot.

Importantly, that outcome is not dependent on technical

characterizations of the non-cumulation clause. To be sure, PRP's argument that the non-cumulation clause is an invalid other-insurance clause under *Owens-Illinois* overreads that case and was rejected properly by the Appellate Division. *Spaulding Composites, supra,* 346 N.J. Super. at 179-80, 787 A.2d 238. As that court noted, the two types of clauses are quite different. Other-insurance clauses typically preclude double recovery when multiple concurrent policies cover a loss. *Carter-Wallace, supra,* 154 N.J. at 322, 712 A.2d 1116. On the contrary, a non-cumulation clause governs successive policies and prevents the accretion of limits when the policies have been triggered by a single occurrence. *See* Barry R. Ostrager & Thomas R. Newman, *Handbook on Ins. Coverage Disputes* § 11.02 (9th ed.1998) (stating that "non-cumulation" clauses reduce limit of liability by any amounts paid by insurer under prior policies with respect to same occurrence). *Owens-Illinois* properly recognized that other-insurance clauses essentially are irrelevant in resolving coverage issues involving multiple successive policies. *Owens-Illinois,* 138 N.J. at 470, 650 A.2d 974 (observing that "[i]f the policies do not overlap, such clauses are not generally applicable"). Nothing in that conclusion disposes of the question of the validity of a non-cumulation clause. *Spaulding Composites, supra,* 346 N.J. Super. at 178-79, 787 A.2d 238.

The Appellate Division likewise rejected PRP's further argument that the non-cumulation clause is an invalid escape clause. *Id.* at 179-80, 787 A.2d 238. Because it is well settled that an escape clause is a sub-species of other insurance, *see* 15 *Couch on Ins.* § 219:5 at 219-12 (3d ed.1999) (observing that there are three basic types of other-insurance clauses including escape clause), and because a non-cumulation clause is not an other- insurance clause, it follows that a non-cumulation clause technically is not an escape clause. Whether it suffers from the same deficiencies has been the subject of several judicial opinions with

different results. *See Air Prods. & Chems. Inc. v. Hartford Accident & Indem. Co.,* Civ. A. No. 86-7501, 1989 WL 73656, at *2 (E.D. Pa. June 30, 1989) (holding that non-cumulation provision did not constitute escape clause, as it only sought to limit, rather than preclude, insurer's liability for claims pending against insured), *vacated in part on o.g.,* 25 F.3d 177 (3d Cir.1994). *But see UTI Corp. v. Fireman's Fund Ins. Co.,* 896 F. Supp. 362, 378 (D.N.J. 1995) (invalidating non- cumulation clause found in other insurance language of policy as unenforceable escape clause, remarking that it is "unacceptable for an insurance company to provide no coverage under a policy for which it received premiums"); *Consolidated Asbestos Coverage Cases, Decision Concerning Phase IV Issues,* No. 1072 (Cal. Jud. Coord. Panel Aug. 29, 1988) (refusing to enforce non-cumulation provision in asbestos context concluding that clause was analogous to "escape" other-insurance clauses that generally are disfavored under law). In any event, we need not resolve that issue here.

As we have indicated, the outcome of this case does not depend on a technical characterization of Liberty's non-cumulation clause, but on the nature of the clause itself. As all parties agree, a non-cumulation clause generally, and Liberty's in particular, operates to limit an insurer's liability under multiple sequential CGL policies where losses related to a "single occurrence" trigger the successive policies. At the heart of a non-cumulation clause is the notion of a "single occurrence" with multiple year effects. Underlying that notion is the "single occurrence" language of the clause that states that damage "arising out of continuous or repeated exposure to substantially the same general conditions shall be construed as arising out of one occurrence." What the non-cumulation clause seeks to avoid is the "cumulation" of insurance policy limits when only one insured act or "occurrence" is involved. *Owens- Illinois* clearly rejected the idea that in an environmental exposure case, successive

policies are triggered by a "single" occurrence. As Judge Brotman underscored in *Chemical Leaman, supra,*

> [t]he New Jersey Supreme Court in *Owens-Illinois* held that under the continuous trigger theory it was propounding, progressive indivisible property damage *should be* treated as an occurrence within each of the years of a CGL policy. *On its face,* this language appears to direct treatment of progressive property damage as distinct occurrences triggering per-occurrence limits in each year of a policy.
>
> [978 F. Supp. at 607 (internal citations and quotation marks omitted) (emphasis added).]

So viewed, the "single occurrence" language does not implicate "cumulation" of policy limits for damage arising out of a single occurrence and is therefore inapplicable by its own terms.

But even if the non-cumulation clause was not facially inapplicable, we would not enforce it because it would thwart the *Owens-Illinois* pro-rata allocation modality. Once the court turns to pro rata allocation, it makes sense that the non-cumulation clause, which would allow the insurer to avoid its fair share of responsibility, drops out of the policy. Indeed, that is the holding of *Outboard Marine Corp. v. Liberty Mut. Ins. Co.,* 283 Ill. App. 3d 630, 219 Ill. Dec. 62, 670 N.E.2d 740, *appeal denied,* 169 Ill. 2d 570, 221 Ill. Dec. 439, 675 N.E.2d 634 (1996), to which we subscribe.

There, the insured, Outboard Marine Corporation (OMC), sought a declaratory judgment that its CGL insurer was obligated to defend it against a suit by governmental agencies concerning water pollution over a period of years. *Id.* at 745. One of OMC's excess insurers, the Home Insurance Company (Home), claimed that its maximum liability to OMC was $2 million because of a non-cumulation clause in Home's policies that otherwise stated

that its maximum liability was $3 and $5 million respectively. *Id.* at 746. After applying the continuous trigger theory to the case and determining that each excess insurer would be liable to OMC based on a pro-rata-time-on-the-risk basis, *id.* at 749-50, the court held the non-cumulation clause unenforceable, stressing that its application would thwart the pro-rata methodology, "would give the insurers a double credit and would deprive the insured of the full value of its premium." *Id.* at 750.

That analysis is wholly congruent with our own. The pro-rata sharing methodology has, at its core, a public policy that favors maximizing, in a fair and just manner, insurance coverage for cleanup of environmental disasters. By applying the non-cumulation clause, insurers who were actually "on the risk" would be insulated from their fair share of liability in direct contravention of *Owens-Illinois*. *See* 15 *Couch on Ins.* § 220:30 (3d ed. 1999) ("Once a court has determined that a loss is to be shared among sequential insurers on a pro rata basis, 'prior insurance' and 'non-cumulation of liability' clauses in the policies become unenforceable.").

We note that none of the cases cited as support for the enforceability of a non-cumulation clause by Liberty and its *amicus* involves application of the continuous trigger and pro-rata allocation methodology of *Owens-Illinois*. *See, e.g., Dickies Indus. Servs., Inc. v. Liberty Mut. Ins. Co.*, CA No. 1:97-CV-1391-WBH at *3 (N.D. Ga., Aug. 29, 2000) (deciding case prior to federal district court's "educated guess" that manifestation trigger would ultimately be rejected by Georgia courts in favor of continuous coverage trigger); *Endicott Johnson Corp. v. Liberty Mut. Ins. Co.*, 928 F. Supp. 176, 181 (N.D.N.Y. 1996) (applying injury-in-fact trigger--where coverage triggered if actual injury takes place during policy period), *appeal dismissed*, 116 F.3d 53 (2d Cir. 1997); *IO-I Brockway Glass Container, Inc. v.*

Liberty Mut. Ins. Co., Civ. No. 90-2797, 1994 WL 910935 (D.N.J. Feb.10, 1994) (deciding case prior to New Jersey's adoption of continuous trigger and pro-rate allocation doctrines); *Air Prods. & Chems. Co. v. Hartford Acc. & Indem. Co.*, 707 F. Supp. 762, 769 (E.D. Pa. 1989) (applying continuous trigger but apportioning liability among triggered policies "chronologically and seriatim"), *vacated in part on o.g.*, 25 F.3d 177 (1994). Because the conflict between *Owens-Illinois* and Liberty's non-cumulation clause is the basis for our holding, the cited decisions have no relevance here.

VI

Our sole determination in this case is that Liberty's non-cumulation clause is unenforceable under *Owens-Illinois*. We take no position on the number of occurrences, the actual allocation of responsibility as between carriers, or any other issue except to reaffirm the vitality of the *Owens- Illinois* approach and our commitment to its uniform application.

VII

The judgment of the Appellate Division is reversed. The trial court's grant of summary judgment on the non-cumulation clause in favor of PRP is reinstated.

For reversing--Chief Justice PORITZ and Justices COLEMAN, LONG, VERNIERO, LaVECCHIA, ZAZZALI and ALBIN--7.

Opposed--None.

APPENDIX B

Superior Court of New Jersey,
Appellate Division.

SPAULDING COMPOSITES COMPANY, INC., Plaintiff-Respondent/Cross-Appellant,
v.
LIBERTY MUTUAL INSURANCE COMPANY, Defendant-Appellant/Cross-Respondent,
and
Employers Insurance of Wausau, Allstate Insurance Company, Certain Underwriters at Lloyd's of London, London Market Company, Certain London Market Companies, American Home Insurance Company, Lexington Insurance Company, National Union Fire Continental Insurance Company, Industrial Underwriters Insurance,
Defendants-Appellants,
and
Aetna Casualty and Surety Company, (successor to Northbrook Insurance Company), American Centennial Insurance Company, Greenwich Insurance Company (successor to Harbor Insurance Company), New England Reinsurance Corporation, New Jersey Property-Liability Insurance Guaranty Association, Defendants.

Argued Oct. 10, 2001.
Decided Dec. 26, 2001.

Reversed and remanded.

Klett, Rooney, Lieber & Schorling, attorneys for appellant/cross-respondent Liberty Mutual Insurance Company (Thomas B. O'Brien, Jr. and Joseph B. Silverstein,

Philadelphia, Pa, on the brief).

Lowenstein Sandler, attorneys for respondent/cross-appellant Spaulding Composites Company, Inc. (Robert D. Chesler, of counsel and on the brief; Janet C. Castellano, on the brief).

Martin P. Lavelle, New York City, attorney for respondents National Union Fire Insurance Company of Pittsburgh, PA and Lexington Insurance Company (Mr. Lavelle, on the brief).

Siegal & Napierkowski, attorneys for defendant/respondent Industrial Underwriters Insurance Company (Jerrald J. Hochman, on the letter brief).

Pitney, Hardin, Kipp & Szuch, attorneys for" Interested Party" The Caldwell Trucking PRP Group (Peter J. Herzberg, Morristown, and Kathy Dutton Helmer, on the brief).

Smith, Stratton, Wise Heher & Brennan, Princeton, attorneys for Amicus Curiae Insurance Environmental Litigation Association (Laura A. Foggan, Daniel E. Troy, Meredith Fuchs and Kimberly M. Hrabosky of counsel; Wendy L. Mager on the brief).

Appellants Allstate Insurance Company, Continental Insurance Company, Employers Insurance of Wausau, and Certain Underwriters of Lloyd's, did not file a brief.

Before Judges SKILLMAN, WALLACE JR. and WELLS.

The opinion of the court was delivered by

WALLACE, JR., J.A.D.

Plaintiff Spaulding Composites Company sought a declaration that the non- cumulation clause in the insurance policies of Liberty Mutual and certain other defendants did not apply to its claims resulting from environmental property damage. The trial judge granted plaintiff's motion for partial summary judgment, and issued an order declaring that "the

non-cumulation" clause is inapplicable as a matter of law. We granted leave to appeal from this order. We conclude the contract language of the non-cumulation clause is clear and should be enforced.

We glean the following facts from the limited record on appeal. Spaulding allegedly sent lead-containing waste to a site in Fairfield Township from 1958 to 1973. Spaulding received notice of its potential liability in 1990, and filed bankruptcy in 1993. Subsequently, the bankruptcy court modified the automatic stay to permit the Caldwell Trucking PRP Group (Caldwell Group) and the United States Environmental Protection Agency (EPA) to maintain an action in the United States District Court of New Jersey for a declaratory judgment, and to recover insurance proceeds from Spaulding's insurers. The Caldwell Group filed such an action in July 1994. *See Caldwell Trucking PRP Group v. Spaulding Composites Co.*, 890 F. Supp. 1247, 1250 (D.N.J. 1995).

The insurers' moved to dismiss the Caldwell Group's direct action against them, and that motion was granted. *Ibid.* The district court found Spaulding could maintain its own action against its insurers. In July 1995, Spaulding filed a complaint in the Law Division against defendants who had issued primary or excess liability policies to Spaulding or its predecessors during the relevant period. Spaulding sought a judgment declaring that the insurers were obligated to undertake its defense in the Caldwell Group action, and to reimburse Spaulding for its costs in defending that action.

Spaulding eventually filed a motion for partial summary judgment against Liberty Mutual Insurance Company for a declaration that the non-cumulation clause in Liberty's insurance policies was inapplicable. One of Spaulding's attorneys, Robert Chesler, certified that Spaulding had purchased nine consecutive policies of primary insurance from Liberty covering the years 1975 to 1984. The first

policy had a limit of $500,000, and the other eight policies each had a limit of $1 million. Each of the policies had a version of the clause commonly known as a non-cumulation clause. Further, Chesler certified that during this same period, Spaulding purchased between $23 million and $100 million of excess coverage each year.

Liberty opposed Spaulding's motion and included copies of its insurance policies issued during the nine-year period. Each of the policies issued by Liberty contained a non-cumulation clause entitled "Limits of Liability." The pertinent portion of each policy provided:

LIMITS OF LIABILITY

It is agreed that Section IV of the policy jacket, LIMITS OF LIABILITY, is deleted and replaced by the following: LIMITS OF LIABILITY

Regardless of the number of (1) insureds under this policy, (2) persons or organizations who sustain personal injury or property damage, (3) claims made or suits brought on account of personal injury or property damage to which this policy applies, the Company's liability is limited as follows:

PERSONAL INJURY LIABILITY AND PROPERTY DAMAGE LIABILITY

(A) The limit of liability stated in the schedule as applicable to 'each *occurrence* is the total limit of the company's liability for all damages because of *personal injury* or *property damage* as a result of any one *occurrence.*

* * * *

(C) For the purpose of determining the limit of the company's liability, all *personal injury* and *property damage* arising out of continuous or repeated exposure to substantially the same general conditions shall be

considered as arising out of one *occurrence*.

(D) If the same *occurrence* gives rise to *personal injury* or *property damage* which occurs partly before and partly within the policy period, the 'each *occurrence* ' limit and the applicable aggregate limit of this policy shall be reduced by the amount of each payment made by the company with respect to such *occurrence* under a previous policy or policies of which this policy is a replacement.

Spaulding urged that the non-cumulation clause did not apply because such clauses are not enforceable as a matter of law in environmental property damage cases, and therefore it was entitled to liability coverage from Liberty in the amount of $8.5 million rather than $1 million. Liberty argued that the clear language of the policy limited coverage to $1 million. The motion judge interpreted *Owens-Illinois Inc. v. United Ins. Co.*, 138 N.J. 437, 478, 650 A.2d 974 (1994), to require nullification of the non-cumulation clause in an environmental property damage case. The judge applied the "continuous trigger rule" to treat the progressive damage as an occurrence within each year of the policy. The judge concluded the "non-cumulation clause" was inapplicable as a matter of law and granted partial summary judgment in favor of Spaulding. We granted Liberty's motion for leave to appeal.

Preliminarily, we are satisfied that the meaning and effectiveness of the non-cumulation clause presents a purely legal question that is suitable for decision on a motion for summary judgment. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540, 666 A.2d 146 (1995); *see also Blum v. Prudential Ins. Co. of Am.*, 125 N.J. Super. 195, 197-98, 309 A.2d 905 (Law Div. 1973), *aff'd*, 132 N.J. Super. 204, 333 A.2d 277 (App. Div. 1975). We limit our review to a determination of that issue, and do not address whether there was an "occurrence" during any of the years Liberty insured

Spaulding, or what effect the non-cumulation provisions of the Liberty policy may have upon the coverage provided under any of the various excess policies.

We turn to the essential issue in this appeal, which is whether the non- cumulation clause is unambiguous and enforceable.

"The source of any duty on the part of the Insurance Companies to defend actions or to pay any judgments is obviously in the contract of insurance." *Owens-Illinois, supra*, 138 N.J. at 446-47, 650 A.2d 974. Our Supreme Court has recognized that insurance policies are contracts of adhesion and are subject to special rules. *Longobardi v. Chubb Ins. Co. of N.J.*, 121 N.J. 530, 537, 582 A.2d 1257 (1990). Thus, in interpreting language in an insurance policy courts "assume a particularly vigilant role in ensuring their conformity to public policy and principles of fairness." *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 175, 607 A.2d 1255 (1992). Any ambiguity in an insurance policy should be resolved in favor of the insured. Ibid. "Nevertheless, only genuine interpretational difficulties will implicate the doctrine that requires ambiguities to be construed favorably to the insured." *Progressive Cas. Ins. Co. v. H*urley, 166 N.J. 260, 273-74, 765 A.2d 195 (2001).

In determining whether there is an ambiguity, words in an insurance policy should be interpreted according to their plain and ordinary meaning. *Voorhees, supra*, 128 N.J. at 175, 607 A.2d 1255; *Longobardi, supra*, 121 N.J. at 537, 582 A.2d 1257. Moreover, public policy concerns alone are not sufficient to permit a finding of coverage in an insurance contract where its plain language cannot be read to provide that coverage. *State v. Signo Trading Int'l, Inc.*, 130 N.J. 51, 66, 612 A.2d 932 (1992).

With these principles in mind, we turn to Liberty's contention that the non-cumulation of limits provision is clear and unambiguous. Liberty asserts that the purpose of

the non-cumulation provision is to prohibit stacking or cumulation of policy limits to consecutive Liberty policies that may apply to the same occurrence loss.

The non-cumulation provision clearly states that all damage arising out of "continuous or repeated exposure to substantially the same general conditions constitute a single occurrence." Further, this provision provides that when a single occurrence gives rise to damage "partly before and partly within the policy period," the limits of liability of the policy "shall be reduced by the amount of each payment made by the company with respect to such occurrence under a previous policy or policies of which this policy is a replacement." In our view, this policy language is clear and unambiguous.

Unless our Supreme Court's decisions in *Owens-Illinois, supra*, and *Carter-Wallace Inc. v. Admiral Ins. Co.*, 154 N.J. 312, 712 A.2d 1116 (1998), preclude us from giving effect to the clear policy language, the non-cumulation provisions should be enforced. In Owens-Illinois, the insured sought a declaration that its two lead insurance carriers must provide coverage for Owens Illinois' asbestos related personal injury and property damage claims. The Chancery judge held that all insurers whose policies were triggered under a continuous-trigger theory or injury in-fact theory were jointly and severally liable to the extent of the policy limits. We affirmed in part, reversed in part, and remanded in part. *Owens-Illinois, Inc. v. United Ins. Co.*, 264 N.J. Super. 460, 625 A.2d 1 (App. Div. 1993).

The Supreme Court granted certification to address whether a continuous trigger theory applied, and if so, what would be a fair method of allocation of coverage. The Court explained that the term trigger was merely a label for the event or events that "under the terms of the insurance policy determines whether a policy must respond to a claim in a given set of circumstances." *Owens-Illinois, supra*, 138 N.J.

at 447, 650 A.2d 974. Ultimately, the Court held that "when a progressive indivisible injury or damage results from exposure to injurious conditions for which civil liability may be imposed, courts may reasonably treat the progressive injury or damage as an occurrence within each of the years of a [covered] policy." *Id.* at 478, 650 A.2d 974. Thus, the continuous-trigger theory required each insurer providing coverage during the period to respond to the personal injury claims. *Id.* at 478-79, 650 A.2d 974. Similarly, the Court found that property damage attributable to long-term embedding of contaminates was sufficiently analogous to personal injury to warrant use of a continuous trigger approach. In addressing the method of allocation among multiple triggered policies, the Court held that a fair method of allocation is one that is related to both the time on the risk and the degree of the risk assumed. *Ibid.* Therefore, the Court allocated "the losses among the carriers on the basis of the extent of the risk assumed, i.e., proration on the basis of policy limits, multiplied by years of coverage." *Id.* at 475, 650 A.2d 974.

Further, the Court noted that "other insurance" clauses, which are provisions designed to preclude a double recovery when multiple concurrent policies provide coverage for a loss, were not generally applicable in a continuous triggered situation where successive, rather than concurrent, policies were at issue. *Id.* at 470-71, 650 A.2d 974. The Court stated:

> The other usual principles of interpretation of contracts of insurance do not provide much guidance. As the Appellate Division noted, "O-I was a sophisticated insured and cannot seek refuge in the doctrine of strict construction by pretending it is the corporate equivalent of the unschooled, average consumer." 264 N.J. Super. at 489, 625 A.2d 1. Assessing the objectively reasonable expectations of a policyholder in this context of long- tail

injuries is also very difficult. *Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 330, 495 A.2d 406 (1985). At least in the case of property damages due to environmental contamination, the retroactive imposition of absolute liability under laws like CERCLA, 42 U.S.C. § § 9601-9675, was surely unknown, if not unknowable.

And the doctrine of contra preferentem, construing any ambiguity against the insurer as drafter, *Uniroyal, supra*, 707 F. Supp. at 1376, can produce uneven results. For example, in *Eagle-Picher Industries v. Liberty Mutual Ins. Co.*, 523 F. Supp. 110 (D. Mass. 1981), aff'd, as modified, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028, 103 S. Ct. 1279, 75 L.Ed.2d 500 (1983), the insured preferred a manifestation theory. (On appeal, the insured in *Eagle-Picher* advocated the continuous-trigger theory. 682 F.2d at 16.) In *Forty-Eight Insulations, supra*, 633 F.2d 1212, the exposure theory afforded the insured the most coverage. To have shifting rules of interpretation that depend on the configuration of insurance coverage is unacceptable to us.

The language of the policies does not itself yield either result and the usual rules of interpretation are less helpful in this context.

[*Id.* at 471, 650 A.2d 974].

The Court also noted that the law of environmental liability insurance "will have to develop over time and trial courts must be flexible in responding to new fact situations." *Id.* at 478, 650 A.2d 974.

In *Carter-Wallace, supra*, the Court addressed how excess insurance should be considered when allocating responsibility under a continuous trigger of liability over many years. Initially, the Court rejected both the insured and the insurer's proposed allocation methods. The Court noted that the insurer's method of horizontal exhaustion

subordinated its coverage responsibility to all primary and first-level excess policies in effect during the entire trigger period, and was based on its policy language that required the exhaustion of underlying limits of coverage before its second-level excess policy attached. *Carter-Wallace, supra*, 154 N.J. at 323, 712 A.2d 1116. The Court noted the similarity between the insurer's exhaustion provision and the "other insurance" clauses that were found not to apply in a continuous trigger context. *Id.* at 324-25, 712 A.2d 1116. The Court expressly found that it was "unable to find the answer to the allocation language in the polic[y]." Ibid. Similarly, the Court rejected the insured's approach of treating the loss sustained during the entire period as if it occurred in only one year before looking to the excess coverage limits. Ibid.

Instead, in Carter-Wallace, the Court adopted the approach of Judge Brotman in *Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 978 F. Supp. 589 (D.N.J. 1997), *rev'd on other grounds*, 177 F.3d 210 (3rd Cir. 1999). *Id.* at 325, 712 A.2d 1116. The Court noted that, under similar circumstances, Judge Brotman "adopted a method that vertically allocated each policy in effect for that year, beginning with the primary policy and proceeding upward through each succeeding excess layer." *Id.* at 326, 712 A.2d 1116. The Court gave the following example to demonstrate the fair allocation of losses among carriers to the extent of the risk assumed by each:

> Assume that primary coverage for one year was $100,000, first-level insurance totaled $200,000 and second-level excess coverage was $450,000. If the loss allocated to that specific year was $325,000, the primary insurer would pay $100,000, the first-level excess policy would be responsible for $200,000 and the second-level excess policy would pay $25,000.
>
> [*Id.* at 326-27, 712 A.2d 1116.]

The Court found this approach promoted efficiency by spreading the cost, was simple, respected the difference between primary and excess insurance while not permitting excess insurers to avoid coverage in long-term continuous-trigger cases, and would introduce "a degree of certainty and predictability" in a complex field. Ibid. In particular, the Court expressed "that that solution is consistent with the contract language," as the second-level excess policy "will not be pierced unless and until the primary and first-level excess policies in effect for a given year have been expended." *Id.* at 327, 712 A.2d 1116.

We perceive no inconsistency between the Court's approach in *Owens- Illinois* and *Carter-Wallace* and our approach of applying the clear language of Liberty's non-cumulation clause. In both Owens-Illinois and Carter-Wallace, the Court expressed that it was unable to find the answer to the allocation issue in the language of the policy and found "the traditional rules of interpretation to be unhelpful." *Owens-Illinois, supra*, 138 N.J. at 468- 471, 650 A.2d 974; *Carter-Wallace, supra*, 154 N.J. at 322, 712 A.2d 1116. Therefore, the Court adopted a method that was fair in light of the complexities of environmental litigation. Here, we find the answer in the clear language of the policy. We are compelled to apply the provisions of the policy that a "continuous" or "repeated" exposure shall be treated as "one occurrence" and that "the applicable aggregate limit of [the] policy shall be reduced by the amount of each payment made by the company with respect to such occurrence under a previous policy or policies of which this policy is a replacement." Consequently, Liberty's non-cumulative clause should be enforced to limit its aggregate liability for a continuous or repeated exposure to $1 million.

We are unpersuaded by Caldwell Group's contention that the non- cumulation clause is an "other insurance" clause. Caldwell Group notes that there are three types of "other

insurance" clauses: (1) excess clauses (i.e. the policy pays an excess coverage), (2) pro-rate clauses (i.e. the policy pays a pro-ratio share of the loss) and (3) escape clauses (i.e. the policy pays nothing). Caldwell Group contends that Liberty's non-cumulation clause is an escape clause which does not apply in a continuous trigger context. *See Carter-Wallace, supra*, 154 N.J. at 324-325, 712 A.2d 1116. Caldwell Group cites *UTI Corp. v. Fireman's Fund Ins. Co.*, 896 F. Supp. 362 (D.N.J. 1995), in support of its argument. In *UTI*, the "non-cumulation" clause was contained within the "other insurance" clause and provided that coverage of the policy shall apply as excess of any other applicable coverage and that:

> if the insured has "other insurance" with this Company covering a claim also covered by this policy, the insured must elect which policy shall apply and the Company shall be liable under the policy so elected and shall not be liable under any other provision.

The trial judge concluded the clause was an escape clause because, although the insurer collected premiums for several blanket excess policies, it limited coverage so that the insurer would only be liable under one such policy for any claim made by the insured. *Id.* at 378.

We disagree that the non-cumulation provision in Liberty's policy is an "other insurance" clause. As noted by the Court in *Carter-Wallace*, "other insurance" clauses are "designed to preclude double recovery when multiple *concurrent* policies provide coverage for a loss." *Carter-Wallace, supra*, 154 N.J. at 322, 712 A.2d 1116 (emphasis added). Liberty's non- cumulation clause does not involve concurrent policies. Rather it is addressed to an occurrence that may span successive policy periods. Further, the "other insurance" provisions of Liberty's policies were contained in separate endorsements from the non-cumulation clause. Simply put, Liberty's non-cumulation clause did not

represent an escape clause, or other insurance clause.

We conclude that Liberty's non-cumulation of limits provision is clear, unambiguous and enforceable. We reverse the judgment and remand to enter judgment in favor of Liberty.

APPENDIX C

[Court's File Stamp: Jan 11 2001]

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Attorneys for Plaintiff

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION: ESSEX COUNTY

DOCKET NO. ESX-L-8623-95

SPAULDING COMPOSITES COMPANY,	
PLAINTIFF,	**CIVIL ACTION**
-VS-	
AETNA CASUALTY & SURETY CO., ET AL.,	ORDER
DEFENDANTS.	

The above matter having been opened to the Court by Lowenstein, Sandler, PC, attorneys for Plaintiff, and the Court having considered all papers submitted in opposition thereto, and the Court having heard oral argument, and for good cause,

It is on this the 11th day of January, 2001,

ORDERED THAT the "non-cumulation" clause is inapplicable as a matter of law, and plaintiff's Motion for Partial Summary Judgment is hereby granted,

ORDERED that a copy of this Order be served on all counsel of record within 7 days hereof.

s/ Arthur Minuskin, J.S.C.
Hon. Arthur J. Minuskin, J.S.C.

PAPERS CONSIDERED

	YES	NO	DATE
NOTICE OF MOTION	_____	_____	_____
MOVANT'S AFFIDAVITS	_____	_____	_____
MOVANT'S BRIEF	_____	_____	_____
ANSWERING AFFIDAVITS	_____	_____	_____
ANSWERING BRIEF	_____	_____	_____
CROSS MOTION	_____	_____	_____
MOVANT'S REPLY	_____	_____	_____
OTHER _____	_____	_____	_____

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE

CHAMBERS OF

ARTHUR MINUSKIN

JUDGE T/A

ESSEX COUNTY COURTS BUILDING

NEWARK, NEW JERSEY 07102

December 21, 2000

To all counsel on attached list:

RE: SPAULDING COMPOSITES CO., INC. V. AETNA CASUALTY
DOCKET NO. ESX-L-008623-95

Dear Counsel:

The following is the court's opinion concerning Plaintiff's Motion for Partial Summary Judgment:

The dispute in this case arises from the denial of insurance coverage by the defendant insurers. Plaintiff Spaulding purchased insurance policies from Defendant Liberty Mutual Insurance Company (hereinafter "Liberty") and Plaintiff Spaulding purchased excess insurance coverage from over one dozen other defendant insurance carriers (hereinafter "Excess") over the course of a nine-year period. The policies issued by Defendant Liberty contain a "non-cumulation clause."

Plaintiff Spaulding purchased nine policies of primary insurance from Defendant Liberty. The first policy has a limit of $500,000 and the other eight policies each have limits of $1 million, for a total limit of $8.5 million. These policies provide for coverage for property damage that

occurs during the policy period and contain non-cumulation clauses that promise to provide coverage for property damage continuing beyond the end of a policy year in exchange for reducing the policy limits by the amounts paid for the same occurrence under prior insurance policies.

Defendants Liberty and Excess interpret the "non-cumulation clause" in a manner that denies coverage to Plaintiff Spaulding in excess of $1 million. However, Plaintiff Spaulding's interpretation is that it should receive $8.5 million from Defendant Liberty rather than just $1 million.

Plaintiff moves for Partial Summary Judgment on the basis that the "non-cumulation" clause is inapplicable because such clauses are unenforceable as a matter of law in environmental property damage cases like the matter at bar.

Under *Owens-Illinois*, "non-cumulation" clauses are inapplicable to and unenforceable with respect to environmental property damage claims. The nature of environmental property damage is that such damage occurs continuously and is not divisible into amounts of damage per year. For this reason, *Owens-Illinois* adopted the "continuous trigger rule," which states "when progressive indivisible injury or damage results from exposure to injurious conditions for which civil liability may be imposed, courts may reasonably treat the progressive injury or damage as an occurrence within each of the years of a CGL policy." That is the continuous trigger theory for activating the insurer's obligation to respond under the policies. *Owens-Illinois Inc. v. United Insurance Co.*, 138 *N.J.* 437, 478 (1994).

The injury in the present matter resulted from the transfer of waste by Plaintiff Spaulding to the Caldwell Superfund site in Fairfield, New Jersey and the environmental property damage that occurred as the result of the transfer. Therefore this matter is governed by *Owens-Illinois*, and the

"continuous trigger theory" should be utilized. Further, the situation in the matter at bar is analogous to *Owens-Illinois*. For this reason the "non-cumulation" clause is inapplicable as a matter of law. Plaintiff Spaulding's Motion for Partial Summary Judgment is hereby granted.

Very truly yours,

s/ Arthur Minuskin
ARTHUR MINUSKIN, JSC t/a
(Retired, on recall)

gph
Attachment

APPENDIX E

[Filed Stamp Jun 23 2003]
SUPREME COURT OF NEW JERSEY
M-1347/M-1348 September Term 2002
52,473

SPAULDING COMPOSITES COMPANY, INC.,
Plaintiff
and
CALDWELL TRUCKING PRP GROUP,
INTERESTED PARTY
Respondent,
v.
LIBERTY MUTUAL INSURANCE COMPANY, et al.,
Defendants-Movants.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for an extension of time to file a motion for reconsideration (M-1347) is granted, and it is further

ORDERED that the motion for reconsideration of the opinion (M-1348) is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 20th day of June, 2003.

The foregoing is a true copy
of the original on file in my office.

s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY

APPENDIX F

POST & SCHELL, P.C.
Overlook Center - 2nd Floor
100 Overlook Drive
Princeton, New Jersey 08540
(609) 924-3333
Attorneys for Defendant/Respondent,
Liberty Mutual Insurance Company

SPAULDING COMPOSITES COMPANY, INC., **PLAINTIFF-APPELLANT,** **AND** **CALDWELL TRUCKING PRP GROUP,** **INTERESTED PARTY-APPELLANT,** **V.** **AETNA CASUALTY AND SURETY COMPANY, ET AL.,** **DEFENDANTS-RESPONDENTS.**	**SUPREME COURT OF NEW JERSEY** **A-88, SEPTEMBER TERM 2001** **NO. 52,473** **CIVIL ACTION** **ON MOTION FOR RECONSIDERATION OF THE COURT'S DECISION OF APRIL 10, 2003** NOTICE OF MOTION FOR RECONSIDERATION OF THE COURT'S DECISION OF APRIL 10, 2003 PURSUANT TO R. 2:11-6

TO: STEPHEN W. TOWNSEND, CLERK
Supreme Court of New Jersey
Hughes Justice Complex
25 West Market Street

Trenton, New Jersey 08625

and

All Counsel of Record listed on the attached Certificate of Service

SIR:

PLEASE TAKE NOTICE that pursuant to Rule 2:11-6 of the Rules Governing the Courts of the State of New Jersey, the undersigned, counsel for defendant/respondent Liberty Mutual Insurance Company ("Liberty Mutual"), respectfully moves this Court for an Order granting Liberty Mutual's Motion for Reconsideration of the Court's Decision of April 10, 2003; and

PLEASE TAKE FURTHER NOTICE that Liberty Mutual will rely upon the enclosed Memorandum of Defendant/Respondent Liberty Mutual Insurance Company in Support of the Motion for Reconsideration being filed herewith.

Respectfully submitted,

POST & SCHELL, P.C.

Dated: 04/24/03

BY: s/John C. Sullivan
John C. Sullivan, Esquire
Overlook Center - 2nd Floor
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Attorneys for Defendant-Respondent, Liberty Mutual Insurance Company

APPENDIX G

SPAULDING COMPOSITES COMPANY, INC.,

PLAINTIFF-APPELLANT,

AND

CALDWELL TRUCKING PRP GROUP,

INTERESTED PARTY-APPELLANT,

V.

AETNA CASUALTY AND SURETY COMPANY, ET AL.,

DEFENDANTS-RESPONDENTS.

SUPREME COURT OF NEW JERSEY

A-88, SEPTEMBER TERM 2001
NO. 52,473

CIVIL ACTION

ON MOTION FOR RECONSIDERATION OF THE COURT'S DECISION OF APRIL 10, 2003

MEMORANDUM OF DEFENDANT/RESPONDENT LIBERTY MUTUAL INSURANCE COMPANY IN SUPPORT OF THE MOTION FOR RECONSIDERATION

John C. Sullivan, Escuire
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Attorneys for *Defendant/Respondent, Liberty Mutual Insurance Company*

[TABLES OMITTED]

I. BRIEF STATEMENT OF GROUNDS FOR RECONSIDERATION

This matter is before the Court on Liberty Mutual Insurance Company's motion, pursuant to R. 2:11-6, for reconsideration of the Court's decision of April 10, 2003. In its Opinion, this Court held that "Liberty's non-cumulation clause is unenforceable" under Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437 (1994). Op. at 30. This ruling was based on the Court's determination that Owens-Illinois required courts to "look[] beyond contract language and traditional rules of insurance policy interpretation" in addressing environmental insurance coverage issues. Op. at 21. It is respectfully submitted that Owens-Illinois did not require courts to ignore insurance contract language when, as here, those provisions directly address the handling of the claim at issue. The Court did not declare any policy language unenforceable in Owens-Illinois; it found only that the particular policy language under consideration in that case was inapplicable. While Liberty recognizes that there can be "difficulty inherent in trying to allocate insurance coverage in long-tail environmental exposure cases," Op. at 22-23, it is submitted that the solution to the problem is not to "eliminate[] reliance" on contract language, which has always been the cornerstone of policy interpretation under New Jersey law. Id. at 23.

An essential element of the risk transfer philosophy which Owens-Illinois attempts to promote is risk acceptance by insurers. Court decisions which do not give effect to policy language inhibit risk transfer because insurance companies will not write policies if they do not have confidence that their policy limitations will be honored. In Owens-Illinois, this Court stated that courts should consider the signals sent to the economic system by their decisions. 138 N.J. at 473. A decision that acts as a disincentive to

insurers who might otherwise issue policies will in the long run reduce the available assets to manage environmental risks. Id.

In addition, the Spaulding decision is inconsistent on an issue of critical importance. At one point in the decision, the Court states: "Owens-Illinois clearly rejected the idea that in an environmental exposure case, successive policies are triggered by a 'single' occurrence." Op. at 27. Three pages later, however, the Court stated that "[w]e take no position on the number of occurrences." Op. at 30. Under the Liberty contracts, the non-cumulation clause is not implicated unless there has been a determination that there is only one occurrence. Therefore, it is respectfully submitted that reconsideration is required to clarify this issue.

Finally, this Court's retroactive invalidation of the Limit of Liability provision in Liberty's contracts violates Liberty's due process rights. The Liberty contracts at issue in this case were made between 19 and 27 years ago and, as written, did not allow for the stacking of policy limits. The consequences for Liberty are devastating: Liberty has been left with contracts in which all of the contractual obligations remain intact while the provisions limiting those obligations have been crossed out. As a result, Liberty will be required to pay millions of dollars in this case and hundreds of millions of dollars in other New Jersey cases that it had no contractual obligation to pay. Spaulding constitutes a new rule of law. In the interest of fairness and justice, the Spaulding holding should be applied only prospectively to policies issued after the ruling.[1]

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[1] Liberty Mutual relies on the Statement of Facts set forth in the original briefs before the Court.

II. ARGUMENT

A. THE COURT'S NULLIFICATION OF LIBERTY'S NON-CUMULATION CLAUSE MARKS A SIGNIFICANT DEPARTURE FROM OWENS-ILLINOIS AND NEW JERSEY INSURANCE LAW WHICH HAS REPEATEDLY RECOGNIZED THAT WHEN THE TERMS OF A POLICY ARE CLEAR AND UNAMBIGUOUS THE COURT MUST ENFORCE THE CONTRACT AS WRITTEN.

Courts in New Jersey have long recognized that the most fundamental rule of construction in interpreting an insurance contract, like any other contract, is that the language of the contract controls. Indeed, this is the law in every state. For this reason, New Jersey courts have recognized that they have a duty to construe and enforce insurance contracts as written, without rewriting the contract or disregarding the express language used in the contract in order to provide coverage that was not provided by the contract itself.

In 1976, when Liberty Mutual issued its first policy to Monogram, it had "long been the law of this State that the court is bound to enforce the policy as it is written." Flynn v. Hartford Fire Ins. Co., 146 N.J. Super. 484, 488 (App. Div. 1977), certif. denied, 75 N.J. 5 (1977). Therefore, the New Jersey courts had been "insistent that clear basic terms and particular provisions of an insurance contract may not be disregarded at will and a new contract judicially made for the parties." Linden Motor Freight Co., Inc. v. Travelers Ins. Co., 40 N.J. 511, 525 (1963). To the contrary, "[a]bsent statutory prohibitions, an insurance company has the right to impose whatever conditions it desires prior to assuming its obligations and such provisions should be construed in accordance with the language used." Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960).

These jurisprudential principles continued to be echoed in a long line of New Jersey cases throughout the period of Liberty's coverage up to the decision in Spaulding. These decisions reflect the fundamental recognition that courts "cannot ... write for the insureds a better insurance policy than the one bargained for and purchased." Harleysville Ins. Cos. v. Garitta, 170 N.J. 223, 240 (2001).

In its Opinion, the Court recognized that the non-cumulation language was directly relevant to the allocation issue because "a non-cumulation clause generally, and Liberty's in particular, operates to limit an insurer's liability under multiple sequential CGL policies where losses related to a 'single occurrence' trigger the successive policies." Op. at 26. However, this Court made an explicit determination not to give effect to the policy language, stating that "Owens-Illinois eliminated reliance on particular contract language (other than limits and exclusions) and on traditional rules of interpretation, and set forth a uniform standard for resolving allocation issues in long-tail environmental exposure cases." Id. at 23.

It is respectfully submitted, however, that Owens-Illinois did not negate the critical importance of policy language in determining the obligations of insurers. To the contrary, in Owens-Illinois, this Court acknowledged unequivocally: "The source of any duty on the part of the Insurance Companies to defend actions or to pay any judgments is obviously in the contract of insurance." 138 N.J. at 446-47. Owens-Illinois rested squarely upon the finding that the policy language under consideration in that case – the "other insurance" provision – was simply inapplicable to allocation issues involving successive policies. Id. at 470. In particular, in the section of the Owens-Illinois decision entitled "Does the Language of the Policies Resolve the Allocation Issue?" the Court stated: "We are unable to find the answer to allocation in the language of the policies." Id. at 468. As a

result, the Court looked beyond the contract language in Owens-Illinois only after first finding that it did not shed light on the allocation issue.

Furthermore, it is respectfully submitted that the Owens-Illinois allocation methodology was not premised on a public policy of "maximizing" insurance coverage for environmental cleanup. Op. at 28. In fact, this Court recognized in Owens-Illinois that "[a] more consistent principle is required" because a rule of law premised on nothing more than the result-oriented goal of maximizing coverage is "judicial legislation." 138 N.J. at 452 (internal citation omitted). For this reason, this Court has refused in the past to engage in retroactive revision of an insurance contract, recognizing that it amounts to "an unbargained-for expansion of coverage, gratis, resulting in the insurance company's exposure to a risk substantially broader than that expressly insured against in the policy." Aviation Charters, Inc. v. Avemco Ins. Co., 170 N.J. 76, 80 (2001) (citation omitted).

Proceeding from these same principles, it is respectfully submitted that the non-cumulation provision in Liberty's policies should have been given effect. There is no more critical term in an insurance contract than the limit of liability. It defines how much coverage the insured bought and how much risk the insurer accepted. Alteration of this essential term changes everything. For this reason, the Court, after announcing its allocation methodology in Owens-Illinois, made it clear that it was not reducing the importance of limitations on the degree of risk accepted by the insurer, explicitly noting that "policy limits and exclusions must be taken into account." Owens-Illinois, 138 N.J. at 476. In fact, this caveat was so important that the Court said it twice, emphasizing that indemnity and defense costs should be allocated "in accordance with the mathematical model

developed, subject to policy limits and exclusions." Id. at 477.

On one level, the limit of liability is simply the dollar figure that appears on the Declarations page, but the significance of that dollar figure can be understood only by reference to the Limits of Liability section of the policy. In this case, Paragraph (C) of the Limits of Liability provision of the Liberty policies states that "property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be construed as arising out of one occurrence." No argument was made or could be made that the weekly disposal of Spaulding's lead-containing liquid slurry waste did not involve property damage arising out of continuous or repeated exposure to substantially the same general conditions. Paragraph (D) of the Limits of Liability provision applied when property damage arising out of continuous or repeated exposure to substantially the same general conditions took place over more than one year. It is equally clear that the 15-year history of disposal at the Caldwell Site caused property damage during more than one policy period. The non-cumulation clause, by its very terms, contemplates exactly this type of continuing injury, and required a determination that Liberty's maximum potential liability is $1,000,000.

This Court did not address Liberty's contract language, finding instead that Owens-Illinois had "rejected the idea that in an environmental exposure case, successive policies are triggered by a single occurrence." Op. at 27. However, Owens-Illinois did not hold that property damage arising out of continuous or repeated exposure to substantially the same general conditions should be considered as arising out of separate occurrences, despite contract language which clearly stated the opposite. In fact, Owens-Illinois contains no mention of the Limits of Liability provisions of the policies at issue in that case. As a result, there was no

consideration of contract language similar to the Liberty requirement that "[f]or the purpose of determining the limit of the company's liability, all personal injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be construed as arising out of one occurrence."[2]

Liberty acknowledges that Owens-Illinois states that "when progressive indivisible injury or damage results from exposure to injurious conditions for which civil liability may be imposed, courts may reasonably treat the progressive injury or damage as an occurrence within each of the years of a CGL policy." 138 N.J. at 478. However, this statement did not amount to a determination that there were separate occurrences. This is clear because the Court cautioned that "say[ing] that coverage is afforded under more than one policy seems different from saying that a policyholder may stack the limits of all the policies in effect during a period of repeated or continuous exposure. Id. at 469. If the Court had actually intended to hold that there were separate occurrences, this statement would have made no sense. The fact that the Court found that property damage continued through multiple policy years does not change the fact that it arose from only one "occurrence" – the repeated disposal of waste. More importantly, nothing in Owens-Illinois or New Jersey insurance law suggested that a court should declare a fully applicable contract provision, vital to the parties' bargain, null and void.

The Spaulding ruling appears to have been based on the belief that "[b]y applying the non-cumulation clause, insurers ... would be insulated from their fair share of liability in direct contravention of Owens-Illinois." Op. at 29. It is submitted, however, that retroactive revision of a

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[2] Similarly, there is no identification of the policy language at issue in Chemical Leaman Tank Lines v. Aetna Cas. & Sur. Co., 978 F. Supp. 589 (D.N.J. 1997).

contract two decades after it was made does not promote fairness. The contracts Liberty made, and the premiums it received, were based on the understanding, clearly stated in the typewritten endorsements to the contracts, that Liberty's limits would not be stacked. The contracts capped Liberty's potential liability for a continuing occurrence at $1,000,000. No argument has been made that that these policy terms had been unfairly imposed upon the insured. It was a fair allocation of the parties' relative liabilities because it was what the parties agreed to. In order to prevent a "double credit,"[3] this Court has now increased Liberty's potential liability from $1,000,000 to $8,500,000. Liberty is left to honor contracts it did not agree to write. Its duty to defend was unchanged by the decision; the types of claims for which it owed coverage remained the same; its premiums were not increased. The only page in the contract that was changed was the one that placed a limit on Liberty's obligations. The Spaulding decision nullified the parties' bargain – to the detriment of Liberty only – and substituted a

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[3] Outboard Marine Corp. v. Liberty Mut. Ins. Co., 283 Ill. App. 3d 630, 670 N.E.2d 740, 219 Ill. Dec. 62 (Ill. App.), appeal denied, 675 N.E.2d 634 (Ill. 1996) (hereinafter "OMC"), which was cited by the Court for the "double credit" analysis, involved a dispute between OMC and four of its excess insurers. Id. at 635, 670 N.E.2d at 743. The issues addressed included the application of the non-cumulation provisions in the excess policies. In this context, the OMC Court refused to give the non-cumulation provisions effect. Liberty is unable to determine the basis for the Illinois court's concern that the excess insurers might receive a double credit. However, it is clear that the combination of pro rata allocation and the non-cumulation clause never gives a primary carrier a double credit. For example, if Liberty's allocated share under Owens-Illinois was less than $1,000,000, Liberty would pay that allocated share in total and the non-cumulation provision would never come into play. On the other hand, if Liberty's allocated share was greater than $1,000,000, Liberty would pay $1,000,000 and pro rata allocation would confer no additional benefit because Liberty's liability had already been capped by the policy's occurrence limit.

new contract for the one made by Liberty and Monogram. Zacarias v. Allstate Ins. Co., 168 N.J. 590, 594 (2001).

B. THE COURT'S INVALIDATION OF THE CLEAR LANGUAGE OF LIBERTY'S NON-CUMULATION CLAUSE WAS INCONSISTENT WITH OWENS-ILLINOIS BECAUSE IT INHIBITS RISK TRANSFER BY MAKING INSURERS RELUCTANT TO ISSUE POLICIES COVERING NEW JERSEY RISKS.

The impact of the Spaulding decision will be to inhibit insurers from writing policies because they can no longer have confidence that their obligations will later be determined on the basis of "contract language and traditional rules of insurance policy interpretation." Op. at 21. The decision thus runs counter to the economic underpinning of Owens-Illinois – that the law should "not provide disincentives to parties to acquire insurance when available to cover the risks." 138 N.J. at 472-73. The corollary to this principle is that the law should not discourage insurance companies from issuing policies. It is respectfully submitted that Spaulding undermines the risk-spreading goals of Owens-Illinois because no insurer can set a price for a contract that might end up covering whatever risks a court subsequently concludes should have been covered notwithstanding contract language to the contrary.

As stated by the Court in Owens-Illinois: "The theory of insurance is that of transferring risks." 138 N.J. at 472. As a result, the Court emphasized the importance of "send[ing] the correct signals to the economic system" in order to increase, not decrease, the availability of insurance as an economic resource. Id. at 473 (citation omitted).

An essential element of risk transfer is risk acceptance by insurers, and a prerequisite for risk acceptance is the ability of insurance underwriters, through the language of their policies, to control the amount of risk they accept. When

insurers cannot predict the magnitude of the risks they may be undertaking under the policies they issue, they have two choices – increase premiums significantly to account for the possible imposition of unknown exposures or withdraw from the market altogether. Robert G. Berger, The Impact of Tort Law Development on Insurance: The Availability/Affordability Crisis and its Potential Solutions, 37 Am. U.L. Rev. 285, 300 (1988). Such decisions thus weaken the risk transfer mechanism because they create an incentive not to sell insurance, rather than an incentive to buy it.

In light of Spaulding, insurers will have to consider the possibility of judicial invalidation of policy limitations when pricing their policies. As a result, many insureds will have to pay a higher premium because premium pricing will have to include both a fair price for the coverage actually set forth in the contract plus an additional premium factor to cover the risk of judicial nullification of the policy's limitations. Secondly, insurers may be forced to eliminate coverage for continuous or repeated exposure to conditions or issue policies which exclude New Jersey operations. The pitfall to judicially created coverage is that "insurers will simply withdraw from the business of liability coverage, leaving the field with less competition and higher rates." American Home Products Corp. v. Liberty Mut. Ins. Co., 565 F. Supp. 1485, 1511 (S.D.N.Y. 1983), aff'd, 748 F.2d 760 (2d Cir. 1984).

This is not mere speculation; it is experience. As explained in the correspondence sent by the Insurance Services Office to New Jersey regulators, after courts refused to give effect to the "sudden and accidental" pollution exclusion, the absolute pollution exclusion was created because "if companies do not have the option to delete the pollution coverage, they will simply not write any liability coverage at all." Edward Zampino, Richard C. Cavo, &

Victor C. Harwood, III, The Sophist's Maze: The Polluters' Revision Of The History Of The "Total" Pollution Exclusion, 8 Mealey's Litigation Reports: Insurance No. 44 (Sept. 27, 1994).

It must be recognized that the implications of the Spaulding decision go far beyond the dispute between the named parties in this case. It has never been the law of New Jersey that insurers "could not contract away [the] risks" that they do not want to accept. Op. at 19. To the contrary, in French v. New Jersey School Board Ass'n Ins. Group, 149 N.J. 478 (1997), the Court emphasized the significance of the clear language of applicable insurance policies in resolving coverage questions, id. at 493, and expressed confidence that "policy drafters have either anticipated or can anticipate most of the recurring problems." Id. at 494. In Magnifico v. Rutgers Cas. Ins. Co., 153 N.J. 406, 418 (1998), the Court expanded on this concept, stating that "insurers can modify policy language in an effort to address issues of ... coverage and liability."

Although these were underinsured motorist coverage cases, they were fully consistent with this Court's rulings for nearly a century. As early as 1922, in Kerpchak v. John Hancock Mut. Ins. Co., 97 N.J.L. 196, 198 (1922), the Court of Errors and Appeals recognized the importance of "the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of premium." Similarly, in Wickner v. American Reliance Ins. Co., 141 N.J. 392, 398 (1995), this Court gave effect to an unlisted premises exclusion because the Court properly recognized that "the unlisted property and the risks associated with it have not been included in the underwriting consideration or the determination of the cost of the policy."

The common denominator to all of these cases is the fundamental recognition that insurers have a right to control the amount of risk they accept and that insurance can only

operate if clear and unambiguous policy limitations are enforced as written. Expanding the liabilities of an insurer beyond the contractually defined limits of liability undermines the risk-for-premium exchange which is the essential element of the risk transfer mechanism. For this reason, Liberty respectfully requests that this Court reconsider its decision.

C. RETROACTIVE APPLICATION OF THE COURT'S DECISION WOULD VIOLATE THE DUE PROCESS CLAUSE.

As explained above, prior to the decision in this case, decades of precedent in New Jersey held that unambiguous language in insurance contracts must be enforced. This was the settled rule during the years in which the parties entered into the contracts at issue. This case is the first New Jersey case to depart from that rule. It is submitted that application of the new rule of law to the long-settled contractual obligations involved here would violate the "limitations on retroactive judicial decisionmaking" that are "inherent" in the Due Process Clause of the federal Constitution. Rogers v. Tennessee, 532 U.S. 451, 457, 466 (2001).

The United States Supreme Court has recognized that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disregarded." Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994). As a result, "due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity." Eastern Enterprises v. Apfel, 524 U.S. 498, 549 (1998) (Kennedy, J., concurring); see also Lynce v. Mathis, 519 U.S. 433, 440 (1997) ("In both the civil and criminal context, the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects.").

It is respectfully submitted that retroactive application of the rule adopted in this case would violate the Due Process Clause in three respects. First, the basic due process principles of notice and fair warning are violated by the retroactive application of a judicial decision that is "'unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue.'" Rogers, 532 U.S. at 462 (quoting Bouie v. City of Columbia, 378 U.S. 347, 354 (1964)). This does not mean that the decision itself must be indefensible – only that it must be a "marked and unpredictable departure from prior precedent" on the books when the conduct at issue occurred. Id. at 467. In Rogers, the Court concluded that a retroactive judicial decision did not violate due process only because the common-law rule eliminated by the decision was, at the time of the earlier conduct, already "widely viewed as an outdated relic" and had been abolished by the "vast majority of jurisdictions." Id. at 462. By contrast, the rule adopted in this case is explicitly derived from Owens-Illinois, itself a "watershed" case decided almost twenty years after the first of the Liberty contracts was made. Between 1976 and 1984 there was simply no precedent – no "law which had been expressed" – in New Jersey or any jurisdiction that would have given insurers and insureds any notice that limits of liability in an insurance contract would not be enforced just like any other unambiguous contractual language. As discussed above, the precedents were all uniformly to the contrary. Because the rule adopted in this case is a "marked and unpredictable departure" from those precedents, it would be violation of due process to apply the rule to the contracts at issue here.

Second, the "degree of retroactive effect" is also a "significant determinant" as to the constitutionality of retroactive civil liability under the Due Process Clause. Apfel, 524 U.S. at 549 (Kennedy, J., concurring). "If retroactive laws change the legal consequences of

transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership." Id. Accordingly, in Apfel, the Court invalidated a federal law imposing several millions of dollars of mineworkers' benefits liability on a coal company for events that took place 35 years earlier. The plurality reasoned: "The distance in the past that the Act reaches back to impose liability on Eastern and the magnitude of that liability raise substantial questions of fairness." Id. at 534. Although the plurality addressed the problem under the Takings Clause, see infra at 533, Justice Kennedy's concurrence – which reflected his decisive fifth vote – explained the same problem in terms of the Due Process Clause, finding a violation of the Clause because "in creating liability for events which occurred 35 years earlier the Coal Act has a retroactive effect of unprecedented scope." Id. at 549. Both Justice Kennedy and the four-Justice plurality recognized that while Congress might well have a legitimate interest in resolving "the problem of funding miners' benefits," "the Constitution does not permit a solution to [that] problem ... that imposes such a disproportionate and severely retroactive burden upon Eastern." Id. at 536 (plurality).

Similarly, the decision in this case would fundamentally rework contracts made between 19 and 27 years ago. In doing so it would impose millions of dollars in unexpected liability on one party to those transactions. New Jersey's interest in environmental cleanup cannot be effectuated by imposing severely retroactive burdens on Liberty that are disproportionate to the obligations Liberty agreed to undertake when it negotiated specific and unambiguous limits on its liabilities.

Third, retroactive application of new legal rules is of special concern in the context of impairing specific contractual obligations, for contractual rights are "matters in

which predictability and stability are of prime importance." Landgraf, 511 U.S. at 271. Thus, the Constitution includes a specific prohibition against laws that "impair[] the Obligation of Contracts." U.S. Const., art. I, § 10, cl. 1. The central function of the Clause is to bar states from retroactively "changing the relative situation of debtor and creditor." Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427-28 (1934); see also Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 503 (1987) (Contract Clause's "primary focus was upon legislation that was designed to repudiate or adjust pre-existing debtor-creditor relationships that obligors were unable to satisfy"). Although the Clause by its terms applies only to legislative enactments, Tidal Oil Co. v. Flanagan, 263 U.S. 444, 451 (1924), the Clause's basic protection of existing contractual obligations necessarily applies to judicial decisions under the Due Process Clause; otherwise, the protection afforded by the Clause would be a virtual dead letter. Cf. Bouie, 378 U.S. at 353-54 ("If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.").

There is no doubt that if the New Jersey Assembly enacted a statute barring the enforcement of non-cumulation clauses in insurance contracts, application of that statute to existing insurance contracts would run afoul of the Contracts Clause. The question under the Contracts Clause is whether "the state law has, in fact, operated as a substantial impairment of a contractual relationship," as opposed to a mere "[m]inimal alteration." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244-45 (1978). An impairment is "substantial" if the contracting party "had no reason to anticipate" the impairment, and instead "relied heavily, and reasonably, on this legitimate contractual expectation in calculating" its obligations under the contract. Id. at 245-46.

It is particularly severe when the law "nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability" when those obligations are "in an area where the element of reliance [is] vital." Id. at 246-47. Moreover, even if the law serves a "significant and legitimate public purpose," the Court must still "satisfy itself that the legislature's adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying" the impairment. Keystone, 480 U.S. at 505.

It is respectfully submitted that retroactive application of the decision in this case would contravene the principles underlying the Contracts Clause. Indeed, invalidation of the crucial liability limitation reflected in the non-cumulation provisions strikes at the very heart of the Clause – barring states from "changing the relative situation of debtor and creditor," Blaisdell, 290 U.S. at 427-28. New Jersey courts have recognized that "the relationship between the insurance companies and the beneficiaries named in the policies is that of debtor and creditor." Marks v. Equitable Life Assur., 135 N.J. Eq. 339, 344 (Ch. 1944) (citations omitted). In addition, the impairment of the contract is obviously substantial: the decision in this case "nullifies express terms" of the contract, it imposes "completely unexpected liability," and it is a "severe," "permanent," "immediate," and "retroactive" change in the parties' contractual relationship.

The impact of retroactive invalidation is particularly significant in the context of Liberty's Limits of Liability provision because this provision is critical in determining not just the price of the contract, but more fundamentally, whether the insurer is willing to enter into the contract at all. Furthermore, the impairment of Liberty's contract was not necessary to meet the important societal goal of environmental cleanup. The imposition of obligations

beyond those agreed to by contract requires Liberty to bear a disproportionate burden to fund remediation which is neither a "reasonable condition" nor "a character appropriate to the public purpose" of providing for such remediation. Keystone, 480 U.S. at 505

For all these reasons, it is respectfully submitted that the Spaulding decision is "outside the bounds of retroactivity permissible under our law." Apfel, 524 U.S. at 550 (Kennedy, J., concurring). However, as this Court has long recognized, while its decisions are presumptively applied retroactively, they need not be when the holding of a case constitutes a "new rule of law," State v. Burstein, 85 N.J. 394, 403 (1981), and "it is in the interest of fairness and justice to apply the holding only prospectively," Green v. Selective Ins. Co. of Am., 144 N.J. 344, 355 (1996). Consistent with the due process limitations discussed above, the "primary focus of retroactivity is with considerations of fairness and justice, related to reasonable surprise and prejudice to those affected." Green v. Auerbach Chevrolet Corp., 127 N.J. 591, 600-01 (1992) (internal quotation marks omitted).

This case involves substantial problems of surprise and reliance. Nothing in New Jersey law between 1976 and 1984 provided either party a basis for predicting that the Limits of Liability language would be unenforceable. To the contrary, both parties should have expected that unambiguous contractual provisions would be enforced. The prejudice to Liberty is severe. In this case alone, Liberty's potential liability has been increased more than eight times – from $1,000,00 to $8,500,000 – and Liberty will potentially face hundreds of millions of dollars of additional exposure in other New Jersey cases involving Liberty contracts made long ago which contained anti-stacking provisions Accordingly, this Court should exercise its authority to "make the new rule of law [adopted in this case] purely

prospective, applying it only to cases whose operative facts arise after the decision is announced [*i.e.*, to cases involving insurance contracts negotiated after this decision]." Burstein, 85 N.J. at 304.

D. RETROACTIVE APPLICATION OF THE COURT'S DECISION WOULD VIOLATE THE TAKINGS AND EX POST FACTO CLAUSES.

It is respectively submitted that applying the new rule announced in this case retroactively would also violate the Takings Clause of the federal Constitution, U.S. Const. amend V, for essentially the same reasons retroactive application would violate due process. "The aim of the [Takings] Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Apfel, 524 U.S. at 522 (plurality opinion) (quotation omitted). That would be the impact of Spaulding, if applied retroactively. As the Apfel plurality explained, governmental action constitutes an impermissible taking "if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." Apfel, 524 U.S. at 528-29. That test is easily met here: as discussed above, the liability imposed is "severe," it is "retroactive," it is imposed on a "limited class of parties," it "could not have [been] anticipated," and it is "substantially disproportionate to the parties' experience" – which experience was to negotiate the very liability limitation the decision rejects.

Finally, the Constitution's Ex Post Facto Clause may also be implicated by the Spaulding decision. Although Liberty acknowledges that the ban on ex post facto legislation has come to be interpreted as reaching criminal law only, it is a legitimate question whether or not that was the interpretation

intended by the Framers. In his concurrence in Apfel, Justice Thomas stated that in an appropriate case, he would be willing to reconsider "whether a retroactive civil law that passes muster under our current Takings Clause jurisprudence is nonetheless unconstitutional under the Ex Post Facto Clause." Apfel, 524 U.S. at 539 (Thomas, J., concurring).

III. CONCLUSION

For the reasons stated above, Liberty respectfully requests that this Court reconsider its decision in this matter.

Respectfully submitted,

POST & SCHELL, P.C.

Dated: April 10, 2003

BY: s/ John C. Sullivan
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Attorneys for Defendant-Respondent, Liberty Mutual Insurance Company

APPENDIX H

POLICY LANGUAGE FROM THE LIBERTY MUTUAL POLICIES FOR THE PERIOD 1976 TO 1984

By means of endorsements to each of the Liberty policies, the Limits of Liability provisions in the preprinted policy jackets to the Liberty policies were deleted and replaced by typewritten language specifically addressing the amount of risk accepted by Liberty under its contracts. The relevant policy language in the endorsement provides:

> (A) The limit of liability stated in the schedule as applicable to "each occurrence" is the total limit of the company's liability for all damages because of bodily injury, personal injury and property damage as a result of any one occurrence.
>
> (C) For the purpose of determining the limit of the company's liability, all bodily injury, personal injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence.
>
> (D) If the same occurrence gives rise to bodily injury, personal injury or property damage which occurs partly before and partly within the policy period, the "each occurrence" limit and the applicable aggregate limit of this policy shall be reduced by the amount of each payment made by the company with respect to such occurrence under

> a previous policy or policies of which this policy is a replacement.

PRPa150 (emphasis in original).

The word "occurrence" is defined in the policy jacket as:

> "occurrence" means an accident including continuous or repeated exposure to conditions which results in **bodily injury** or **property damage** neither expected nor intended from the standpoint of the insured.

PRPa164 (emphasis in original).

No. 03-638

IN THE

Supreme Court of the United States

LIBERTY MUTUAL INSURANCE CO.,

Petitioner,

v.

CALDWELL TRUCKING PRP GROUP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION FOR RESPONDENT CALDWELL TRUCKING PRP GROUP

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QUESTIONS PRESENTED

Whether Liberty Mutual's failure to raise any federal issues in the state court proceedings until it filed a motion for reconsideration following the New Jersey Supreme Court's adverse decision should result in a denial of review by certiorari.

Whether the New Jersey Supreme Court's interpretation of its own precedent, holding a non-cumulation clause in a comprehensive general liability insurance policy unenforceable where environmental injury to property has occurred over successive years, violates the Due Process Clause or the Takings Clause of the United States Constitution.

LIST OF PARTIES AND CORPORATE DISCLOSURE

The Caldwell Trucking PRP Group ("Caldwell Trucking") adopts the corporate disclosure statement included in the Petition.

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STATEMENT OF JURISDICTION

As explained below, there is a substantial question whether this Court has jurisdiction over this Petition pursuant to 28 U.S.C. § 1257(a) (1993), due to Petitioner Liberty Mutual Insurance Co.'s failure to raise any federal questions in the state courts below until it filed a motion for reconsideration before the New Jersey Supreme Court.

STATEMENT OF THE CASE

This Petition seeks to restate issues of state contract law regarding insurance coverage in the guise of constitutional questions. However, the constitutional issues are without merit, and thus the issues are best left to the state courts to resolve. Specifically, Liberty Mutual belatedly seeks to make a federal issue out of the New Jersey Supreme Court's interpretation of its existing, well-established precedents as they apply to a non-cumulation clause in an insurance policy within the context of environmental injury taking place over multiple, successive years. In holding Liberty Mutual's non-cumulation clause to be inapplicable and unenforceable under the circumstances presented, the New Jersey Supreme Court did exactly what state courts have traditionally done as a matter of state law – interpreting their own precedents and State public policy – without running afoul of the United States Constitution. Thus, this case presents issues that are neither novel nor profound.

A. Procedural History

The opinion of the New Jersey Supreme Court below (the "*Spaulding* Opinion")[1] sets forth the procedural history of this matter. Pet. App. 4a-6a. What is not evident from that recitation is that, even though Spaulding's arguments against enforcing the non-cumulation clause have been articulated consistently from the outset, the constitutional challenges raised by Liberty Mutual herein were not raised at all when this matter was first addressed to the trial court, or thereafter to the intermediate appellate court, or even thereafter to the New Jersey Supreme Court. Only ***after*** the New Jersey Supreme Court had rendered its decision against Liberty Mutual did Liberty Mutual first raise constitutional issues, on a motion for reconsideration that is best construed as an eleventh-hour attempt to create federal jurisdiction for this Petition.

Specifically, in moving for partial summary judgment in the trial court, Spaulding expressly challenged the enforceability of Liberty Mutual's non-cumulation clause. Spaulding argued that the non-cumulation clause was inapplicable to a multi-year environmental injury to property in accordance with New Jersey Supreme Court precedent, *Owens-Illinois, Inc. v. United Insurance Co.*, 138 N.J. 437, 650 A.2d 974 (1994), and its progeny. In opposing that motion, Liberty Mutual submitted voluminous arguments but

---

1. In the New Jersey Supreme Court, this case was captioned *Spaulding Composites Co. v. Aetna Casualty & Surety Co.* While the appeal was pending, Spaulding assigned all of its rights to coverage to the Caldwell Trucking PRP Group, the Respondent herein. For ease of reference, this Brief refers to the insured as "Spaulding" in the state court proceedings and "Caldwell Trucking" with regard to this proceeding.

never once suggested that the result advocated by Spaulding would violate the Contracts Clause, the Takings Clause, or any other constitutional provision. After the trial court granted partial summary judgment to Spaulding and expressly declared the non-cumulation clause unenforceable under the teachings of *Owens-Illinois*, Liberty Mutual sought and was granted leave to appeal on an interlocutory basis by the New Jersey Superior Court, Appellate Division. In neither its brief seeking leave to appeal nor in its brief on the merits to the Appellate Division did Liberty Mutual raise any constitutional challenges to the trial court's decision.

After the Appellate Division reversed the trial court, finding the non-cumulation clause to be unambiguous and enforceable, Spaulding sought and was granted leave to appeal to the New Jersey Supreme Court to seek to reinstate the trial court's judgment holding the non-cumulation clause unenforceable under *Owens-Illinois*. In opposing leave to appeal, Liberty Mutual still did not raise a constitutional issue with regard to the trial court's decision. Indeed, at no time during briefing or oral argument before the New Jersey Supreme Court did Liberty Mutual ever raise a Due Process Clause, Takings Clause, or any other constitutional challenge to the trial court's decision. Not until ***after*** the New Jersey Supreme Court had reversed the Appellate Division and confirmed the trial court's *Owens-Illinois* analysis did Liberty Mutual first raise, on a motion for reconsideration, arguments against retroactivity that were grounded in the Due Process, Contracts, and Takings Clauses. Under the applicable New Jersey court rules, Spaulding did not have an opportunity to oppose Liberty Mutual's belated constitutional arguments, but the New Jersey Supreme Court rejected the motion for reconsideration summarily, without an opinion. Pet. App. 43a.

B. The *Spaulding* Opinion

Much of the *Spaulding* Opinion presents a recapitulation of the New Jersey Supreme Court's 1994 decision in *Owens-Illinois*, a "watershed" opinion in the "cripplingly complex area of long-tail environmental exposure insurance coverage." Pet. App. 16a. The Court explained that *Owens-Illinois* was intended to "develop a fair and uniform methodology for addressing complex environmental coverage disputes" because "traditional techniques of contract interpretation cannot produce a coherent result." Pet. App. 17a-18a (quoting *Owens-Illinois*, 138 N.J. at 471, 650 A.2d at 992). In *Owens-Illinois*, the Court adopted the "continuous trigger" theory, holding that, in cases of progressive indivisible injury or damage resulting from exposure to injurious conditions, courts may reasonably treat the progressive injury or damage as an "occurrence" within each of the years of a CGL policy. 138 N.J. at 178-79, 650 A.2d at 995. Then, policies must respond to a claim on a prorated basis, including claimants' responsibility for periods of self-insurance or no insurance, allocating losses on the basis of the extent of the risk assumed (pro-ration on the basis of policy limits multiplied by years of coverage). *Id.* at 479, 650 A.2d at 995.

In the *Spaulding* Opinion, after reaffirming the allocation method established by *Owens-Illinois* and its progeny and the public policy that led to it, the Court explained why the non-cumulation clause was: (1) inapplicable on its face; and (2) could not be enforced "consonant with the rules adopted in *Owens-Illinois* and affirmed in *Carter-Wallace*." Pet. App. 19a. The non-cumulation clause, on its face, treats a multi-year injury as a single "occurrence" that is covered up to a single insurance policy limit. *Owens-Illinois* and its

progeny held that in multi-year environmental injury cases, each year was a separate "occurrence." Applying that precedent to the language of a non-cumulation clause, the New Jersey Supreme Court concluded that Liberty Mutual's non-cumulation clause did not apply on its face. Pet. App. 21a-22a. Further, the Court held that the non-cumulation clause could not be enforced as advocated by Liberty Mutual because to do so would violate the public policy reflected in *Owens-Illinois* and its progeny. Pet. App. 22a-24a.

REASONS FOR DENYING THE PETITION

I. CERTIORARI SHOULD BE DENIED BECAUSE NO FEDERAL ISSUE WAS TIMELY RAISED BELOW.

Under 28 U.S.C. § 1257(a) and long-standing Supreme Court precedent, this Court has no jurisdiction to exercise appellate jurisdiction over a final judgment of a state's highest court unless a federal question has been "raised, presented, and pursued in a timely and proper manner at the appropriate point or points in the state court proceedings." Stern *et al.*, Supreme Court Practice, § 3.18, 175 [8th ed. 2002] (citing *Beck v. Washington*, 369 U.S. 541, 550-54 (1962)). Liberty Mutual bears the burden to show that a federal question was "brought to the attention of the state court with fair precision and in due time." *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997); *see also Campbell v. Louisiana*, 523 U.S. 392, 403 (1998); *Street v. New York*, 394 U.S. 576, 582 (1969); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Indeed, Supreme Court Rule 14.1(g)(i) mandates that petitioner's Statement of the Case specify:

> both in the court of first instance and in the appellate courts, when the federal questions

> sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

As the Petition herein reveals (see Pet. at 15), the federal constitutional questions for which Liberty Mutual now seeks review were not raised in the trial court, nor in the intermediate trial court, nor in the initial proceedings before the New Jersey Supreme Court. In all of their written submissions and oral arguments before the state courts, Liberty Mutual argued strictly issues of state contract and insurance law. Yet, from the outset, it was clear that the issue to be resolved by the courts was whether non-cumulation clauses in a contract were enforceable with respect to environmental property damage claims in light of *Owens-Illinois* and its progeny. The alleged constitutional infirmities occasioned by a negative answer to that question should have been no less apparent in the trial court than they are today. Liberty Mutual either did not think of them or simply chose not to make them.

Spaulding argued in the trial court that *Owens-Illinois* rendered the non-cumulation clause inapplicable and unenforceable, and the trial court so held: "[T]his matter is governed by *Owens-Illinois*, and the 'continuous trigger theory should be utilized. Further, the situation in the matter at bar is analogous to *Owens-Illinois*. For this reason the 'non-cumulation' clause is inapplicable as a matter of law." Pet. App. 42a. No constitutional issue was raised by Liberty

Mutual before the trial court, which explains that court's failure to address any such issue. In seeking reversal of that decision in the Appellate Division, Liberty Mutual sought to distinguish *Owens-Illinois* and its progeny, but did not once suggest that the trial court's decision interpreting *Owens-Illinois* violated the Constitution. The appellate court, which eventually sided with Liberty Mutual, also recognized that the pivotal issue was the effect of *Owens-Illinois*: "[u]nless our Supreme Court's decisions in *Owens-Illinois, supra,* and *Carter-Wallace Inc. v. Admiral Ins. Co.,* 154 N.J. 312, 712 A.2d 1116 (1998), preclude us from giving effect to the clear policy language, the non-cumulation provisions should be enforced." Pet. App. 31a. However, no constitutional infirmity was raised in the briefing or argument before the Appellate Division either.

The New Jersey Supreme Court focused immediately on the core issue presented by the appeal: "[t]he question presented is whether the non-cumulation clause in Liberty's CGL policies can be enforced consonant with the rules we adopted in *Owens-Illinois* and affirmed in *Carter-Wallace.* The answer is that it cannot." Pet. App. 19a. Again, the Court's lengthy explication of *Owens-Illinois* and its application to the facts presented is devoid of any mention of federal issues because, as in the lower courts, at no point in the briefing or argument did Liberty Mutual suggest that to reinstate the trial court's decision would violate the Constitution or any other federal law. It is thus not surprising that, when presented with the "federal afterthought" for the first time on a motion for reconsideration, in which Liberty Mutual argued that retroactive application of the Court's decision would violate due process, see Pet. App. 46a-65a, the New Jersey Supreme Court denied the motion without opinion.

The New Jersey Supreme Court's reaction is justified and consistent with precedent. "Raising the federal question for the first time in a petition for rehearing addressed to the highest state court is generally insufficient unless the court actually entertains the petition and expressly decides the question." Stern *et al.*, Supreme Court Practice, § 3.18, 181 (citing *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932)). Nor can Liberty Mutual avail itself of the limited exception to that rule based on an "unanticipated act" of the lower court. *See Herndon v. Georgia*, 295 U.S. at 443-44. As demonstrated above, the pivotal issue from the outset was whether *Owens-Illinois* rendered the non-cumulation clause unenforceable; therefore, Liberty Mutual cannot claim in good faith that its motion for reconsideration presented the first opportunity for raising the constitutional challenges to such an extension of *Owens-Illinois*.

Finally, this is not a case where the state's highest court refused to deal with a federal question in an attempt to evade this Court's review. *Cf. Williams v. Georgia*, 349 U.S. 375, 382-83 & n.7 (1955); *Rogers v. Alabama*, 192 U.S. 226, 230-31 (1904). Liberty Mutual's failure to raise any constitutional challenge to the trial court's decision refusing to enforce the non-cumulation clause under *Owens-Illinois*, thereby depriving the trial court, the Appellate Division, and even the New Jersey Supreme Court of an opportunity to consider such issues at all or on a timely basis, should be deemed a waiver that deprives this Court of jurisdiction to review the Petition.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE NEW JERSEY SUPREME COURT'S DECISION, GROUNDED ENTIRELY IN NEW JERSEY COMMON LAW PRECEDENT, DOES NOT DECIDE AN ISSUE OF FEDERAL LAW AT ALL, LET ALONE IN A WAY THAT CONFLICTS WITH DECISIONS OF OTHER STATE OR FEDERAL COURTS.

Even if the Court concludes that Liberty Mutual properly preserved the federal issues it raises herein, certiorari should be denied because the New Jersey Supreme Court's decision interpreting an insurance contract is grounded entirely in its own precedents and does not address any issue of federal law. Thus, there is no "important federal question" that was decided by a state court of last resort that conflicts with another court, nor is there a question that "has not been, but should be, settled by this Court," as suggested by Supreme Court Rule 10. In short, this matter of insurance contract interpretation does not present "compelling reasons" for granting certiorari. *Id.*

A. The New Jersey Supreme Court Interpreted the Contract Language and Concluded It Did Not Apply On Its Face and Was Unenforceable Under Existing Precedent

More than nine years ago, the New Jersey Supreme Court issued its "watershed" decision in *Owens-Illinois*, a far-reaching attempt to promote the public welfare in the vexing area of allocating insurance coverage for long-tail environmental injuries. Pet. App. 16a. The *Owens-Illinois* Court, convinced of the inadequacy of contract language and traditional rules of insurance policy interpretation, announced

that "courts must adapt common-law doctrines to the peculiar characteristics of toxic-tort litigation." 138 N.J. at 458-59; 650 A.2d at 985. Eschewing "reliance on particular contract language (other than limits and exclusions) and on traditional rules of interpretation," Pet. App. 19a, the *Owens-Illinois* Court "set forth a uniform standard for resolving allocation issues in long-tail environmental exposure cases." *Id.* (citing *Carter-Wallace*, 154 N.J. at 328, 712 A.2d at 1124). Citing authority from numerous jurisdictions, the *Owens-Illinois* Court adopted the "continuous trigger" theory of liability, Pet. App. 8a-9a, and a pro-rata allocation method. Pet. App. 10a-12a.

Significantly, those choices were expressly rooted in identified public policy considerations: "(1) maximizing resources to cope with environmental injury or damage; (2) giving the greatest incentive to insureds to acquire insurance; and (3) notions of simple justice." Pet. App. 13a (citing *Owens-Illinois*, 138 N.J. at 472-73, 650 A.2d at 992). Thereafter, in *Carter-Wallace*, the New Jersey Supreme Court reaffirmed the "continuous trigger" theory and echoed the policy considerations relied on in *Owens-Illinois*:

> [T]his approach makes efficient use of available resources because it neither minimizes nor maximizes the liability of either primary or excess insurance, thereby promoting cost efficiency by spreading costs. That method also promotes simple justice, by respecting the distinction between primary and excess insurance while not permitting excess insurers unfairly to avoid coverage in long-term, continuous-trigger cases. Additionally, adoption of that allocation method will introduce a degree of certainty and predictability into the complex world

of environmental insurance litigation in continuous-trigger cases.

Carter-Wallace, 154 N.J. at 327-28, 712 A.2d at 1124. *See also Quincy Mut. Fire Ins. Co. v. Borough of Bellmawr*, 172 N.J. 409, 419, 799 A.2d 499, 505 (2002) (noting that the "decision in *Owens-Illinois* was compelled by important public policy considerations, including the need to adapt our tort law to the peculiarities of mass-exposure tort cases").

Thus, although *Owens-Illinois* and *Carter-Wallace* did not address the enforceability of a non-cumulation clause, the precedent was set as to how the Court would interpret such a clause. As noted earlier, non-cumulation clauses are intended to govern situations involving a single occurrence that causes damage over multiple years. Such clauses prevent the accretion of limits when successive policies have been triggered by a single occurrence, in contrast to "other insurance" clauses, which are intended to prevent double recovery where multiple concurrent policies cover a single loss. Because "*Owens-Illinois* clearly rejected the idea that in an environmental exposure case, successive policies are triggered by a 'single' occurrence," Pet. App. 21a-22a, the New Jersey Supreme Court concluded that the "single occurrence" language of the non-cumulation clause "did not implicate 'cumulation' of policy limits for damages arising out of a single occurrence, and was therefore inapplicable by its own terms." Pet. App. 22a.

The New Jersey Supreme Court went on to state that, even if the non-cumulation clause were not facially inapplicable based on the language of the clause itself, the Court would not enforce it because "it would thwart the

Owens-Illinois pro-rata allocation modality. Once the court turns to pro rata allocation, it makes sense that the non-cumulation clause, which would allow the insurer to avoid its fair share of responsibility, drops out of the policy." Pet. App. 22a (citing *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 283 Ill. App. 3d 630, 219 Ill Dec. 62, 670 N.E.2d 740 (App. Ct.), *appeal denied*, 169 Ill. 2d 570, 221 Ill. Dec. 439, 675 N.E.2d 634 (1996)). The Court noted that the pro-rata allocation methodology is grounded in a public policy that "favors maximizing, in a fair and just manner, insurance coverage for cleanup of environmental disasters." Pet. App. 23a.

For purposes of reviewing the Petition at issue here, the facts are thus very simple. *Owens-Illinois* and *Carter-Wallace* are not on appeal to this Court. Rather, they are the common law of the State of New Jersey in the arena of allocating insurance coverage for long-tail environmental injury. The issue here is the application of prior environmental coverage decisions of New Jersey's highest court to yet another issue in that same arena. The Court's decision below was grounded exclusively in state court precedents and public policy considerations. As explained in more detail in the next section, that is the role traditionally reserved for and exercised by state courts, without the oversight of this Court and without violating the Constitution.

B. The *Spaulding* Opinion Does Not Conflict with Decisions of Other State Courts Within the Meaning of Supreme Court Rule 10

In an attempt to meet the guidelines set forth in Supreme Court Rule 10 for granting certiorari, Liberty Mutual posits a conflict between the *Spaulding* Opinion and decisions of

other state courts. Liberty Mutual is correct that there are many decisions, in New Jersey and other jurisdictions, that stand for the general proposition that unambiguous contracts are to be enforced as written. *See* Pet. at 25-27 & n.8. However, trying to parlay that into a conflict among courts requiring resolution by this Court is disingenuous. Liberty Mutual tacitly admits that the cases are legion in which unambiguous contract provisions are deemed unenforceable by courts on public policy grounds.[2] As noted in section 178

2. Examples of such cases include *Blake Constr. Co. v. Upper Occoquan Sewage Auth.*, No. 022075, 2003 WL 22462148, *6-*7 (Va. Oct. 31, 2002) (voiding contract provisions related to delay damages on public policy grounds reflected in statute); *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 110, 121, 6 P.3d 669, 99 Cal. Rptr. 2d 745 (Cal. 2000) (voiding contract provision that limited damages on grounds of unconscionability and public policy); *Duffy v. J. Kokolakis Contracting, Inc.*, 278 A.D.2d 445, 447, 718 N.Y.S.2d 639 (App. Div. 2000) (voiding contract provision on public policy grounds to extent it may be construed to require indemnification for appellant's own negligence); *Rogers v. Webb*, 558 N.W.2d 155, 156-58 (Iowa 1997) (voiding on public policy grounds a contingent fee contract with layperson that facilitated dissolution of marriage); *Saxon Constr. v. Masterclean*, 273 N.J. Super. 231, 235-37, 641 A.2d 1056, 1059 (App. Div. 1994) (holding contract clause unenforceable as against public policy because it permitted culpable party to be unjustly enriched at expense of innocent party); *New Light Co. v. Wells Fargo Alarm Servs.*, 247 Neb. 57, 63-65, 525 N.W.2d 25, 30-31 (1994) (voiding exculpatory provision as against public policy where gross negligence is involved); *FDIC v. American Cas. Co.*, 843 P.2d 1285, 1290, 1294 (Colo. 1993) (voiding unambiguous insurance policy exclusion for claims brought by FDIC on public policy grounds expressed in state banking law); *Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 554, 593 N.E.2d 1365, 583 N.Y.S.2d 957 (1992) (voiding exculpatory provision for gross negligence as against public policy); *In re Terminated Aetna Agents*, 248 N.J. Super. 255, 260, 261, 590 A.2d 1189, 1192 (App. Div. 1990)

(Cont'd)

of the RESTATEMENT (SECOND) OF CONTRACTS, "[a] promise or other term of an agreement is unenforceable on grounds of public policy if . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." RESTATEMENT (SECOND) OF CONTRACTS, § 178(1) (1981). A court may derive a public policy against enforcement of contractual terms from "the need to protect some aspect of the public welfare. . . ." *Id.* at § 179 & Comment (a) (citing, as examples, policies against restraint of trade, impairment of domestic relations, and interference with duties owed to individuals). The dozens and dozens of cases appearing in the annotations to these sections of the Restatement are a testament to the pervasiveness and acceptability of judicial review of private contracts, and the right of courts to declare contractual provisions unenforceable in the public interest.

Liberty Mutual's only response to this century-old line of authority is to state, without any further analysis, that the present case is distinguishable from "question[s] of interpretation committed to the courts" or "question[s] on the margins of contract enforcement – a question, say, of unconscionability or violation of public policy – where the exercise of reasonable judicial judgment is to be expected." Pet. at 20. How or why such cases are distinguishable from this case – where the New Jersey Supreme Court expressly exercised judicial judgment and relied upon public policy

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(Cont'd)
(public policy interest in ensuring adequate auto insurance for NJ citizens prevailed over enforcement of contract that would undermine that public policy; rejecting Contracts Clause argument); *Toker v. Perl*, 108 N.J. Super. 129, 131, 260 A.2d 244, 246 (N.J. Super. App. Div. 1970) (voiding waiver of defenses clause in installment sales contract as against public policy).

concerns related to environmental cleanup – is not at all clear and Liberty Mutual does not elaborate.

In short, therefore, the "conflict among the courts" upon which Liberty Mutual relies is not a true conflict of the type that calls for the exercise of review by certiorari, but rather an example of the flexibility of traditional common law principles that a state court can apply properly, depending upon the circumstances confronted by that court. There is no reason to open the floodgates to permit federal court review of state court decisions, especially on the basis of this matter where the state judicial decision is clearly grounded in rational and reasonable public policy concerns.

III. THE NEW JERSEY SUPREME COURT'S *SPAULDING* OPINION DOES NOT VIOLATE THE UNITED STATES CONSTITUTION.

With regard to the merits of Liberty Mutual's belated constitutional arguments, certiorari should be denied because the New Jersey Supreme Court's decision does not violate the Due Process Clause or the Takings Clause.

A. The New Jersey Supreme Court's *Spaulding* Opinion Does Not Violate the Due Process Clause or the Contracts Clause

In its effort to cloak these state law insurance issues with the mantle of a due process claim, Liberty Mutual seeks to import "the basic constitutional protection of contractual rights afforded by such provisions as the Contracts Clause" into the Due Process Clause. Pet. at 17. Alternatively, Liberty Mutual argues that the Due Process Clause prohibits the imposition of "retroactive civil liability" such as the

New Jersey Supreme Court's decision allegedly imposes on Liberty Mutual. Neither argument has merit.

1. The Contracts Clause

As Liberty Mutual admits, the Contracts Clause by its own terms applies only to legislative enactments. Pet. at 17. The proscription that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts," (U.S. Const. art. I, § 10, cl. 1), historically has been interpreted by the Supreme Court to apply to the legislative arm of state government and not the state judiciary. As noted by one commentator, "[t]he Supreme Court has read the [Contracts] Clause this way for at least seventy-five years, consistently refusing to constrain judicial decisions undermining contractual expectations." Barton H. Thompson, Jr., *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373, 1375 & n.9 (1992) (citing *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1924)). Given the Court's long-standing refusal to apply the Contracts Clause ***directly*** to judicial decisions, Liberty Mutual's attempt to apply it ***indirectly*** through the Due Process Clause should not succeed.[3] The absence of any case law permitting

3. The only case cited by Liberty Mutual to support the proposition that the judiciary should not be permitted to do what the Constitution prohibits the legislature from doing is *Bouie v. City of Columbia*, 378 U.S. 347 (1964). That case is limited in scope and easily distinguishable. First, *Bouie* had nothing to do with the Contracts Clause. In *Bouie*, the Supreme Court held that an "unforeseeable judicial enlargement of a criminal statute, applied retroactively" is barred by the due process clause. *Id.* at 353-54. All the cases construing *Bouie* deal with "after-the-fact increases in the degree of punishment" and the "ex post facto construction of substantive criminal statutes." *See, e.g., United States v. Newman*, (Cont'd)

such an indirect importation of the Contracts Clause into the Due Process Clause confirms the validity of that conclusion.

Moreover, as Liberty Mutual acknowledges, even in the case of legislative impairments of contract, only "substantial" impairments are invalid. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)). Even then, a "substantial" impairment still may be upheld if it is "necessary" to serve a "significant and legitimate public purpose." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 505 (1987) (finding that Pennsylvania has a "strong public interest in preventing this type of harm [from mining operations], the environmental effect of which transcends any private agreement between contracting parties"); *see also Energy Reserves Group, Inc.*, 459 U.S. at 412 (identifying "significant and legitimate public purpose such as the remedying of a broad and general social or economic problem"). Once a legitimate public purpose is identified, the court need find only that the legislature's "adjustment of 'the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a

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(Cont'd)

203 F.3d 700, 702 (9th Cir. 2000). Nothing in *Bouie* suggests that the Court intended its due process analysis in the criminal context to apply in the civil context, let alone to the Contracts Clause. Second, in *Rogers v. Tennessee*, 532 U.S. 451 (2001), the Court clarified that the *Bouie* language stating that the Due Process Clause operated in the same manner as the Ex Post Facto Clause was dicta, noting that "[i]ts rationale rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on ***the constitutionality of attaching criminal penalties to what previously had been innocent conduct***." *Id.* at 459 (emphasis added).

character appropriate to the public purpose justifying [the legislation's] adoption.'" *Keystone*, 480 U.S. at 505 (quoting *Energy Reserves Group, Inc.*, 459 U.S. at 412, quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977)).

Conceding, as it must, that "[e]nvironmental cleanup may be an important public interest," Pet. at 20 n.7, Liberty Mutual is left to complain that the decision below "does not even purport to explain why it is 'necessary' to serve that interest by forcing insurers to pay many more times for cleanup than they ever promised to pay." *Id.* But the New Jersey Supreme Court went to great lengths in the decision below to identify and expound upon the significant and compelling reasons why they have chosen to allocate insurance coverage for long-tail environmental injury as *Owens-Illinois* and its progeny do, in furtherance of clearly identified public policy. The fact that Liberty Mutual might prefer to see that interest served by a different allocation methodology does not diminish the vitality or validity of the New Jersey Supreme Court's rationale.

In addition, in rejecting constitutional challenges to state regulation, courts have found it significant that the parties are operating in a heavily regulated industry such as utilities or insurance. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 194 & n.14 (1983) (oil and gas) (rejecting Contracts Clause challenge to a statutory pass-through prohibition); *Energy Reserves Group, Inc.*, 459 U.S. at 413 (energy); *Calfarm Insurance Co. v. Deukmejian*, 48 Cal. 3d 805, 830, 771 P.2d 1247, 1262, 258 Cal. Rptr. 161, 176 (1989) (auto insurance). In *Calfarm*, the California Supreme Court held that a statutory limitation upon an insurer's power to refuse to renew automobile policies did apply to policies already in existence at the time of the statutory enactment, but did not violate the

Contracts Clause. The Court emphasized, "[i]t is no longer open to question that the business of insurance is affected with a public interest. . . . Neither the company nor a policyholder has the inviolate rights that characterize private contracts. The contract of the policyholder is subject to the reasonable exercise of the state's police power." *Id.* (quoting *Carpenter v. Pacific Mut. Life Ins. Co.*, 10 Cal. 2d 307, 329, 74 P.2d 761, 776 (1937)). *See also American Manuf. Mutual Ins. Co. v. Commissioner of Ins.*, 374 Mass. 181, 372 N.E.2d 520 (1978) (upholding statute requiring insurance carriers to rewrite insurance contracts retroactively against constitutional challenge because legislature could rationally have concluded that competitive rate system had failed and had resulted in serious financial difficulties for policyholders); *Hinckley v. Bechtel Corp.*, 41 Cal. App. 3d 206, 215, 116 Cal. Rptr. 33 (1974) (holding a law could be applied to existing insurance policies, noting "[t]he cases are legion which hold that the police power of the state to regulate insurance business cannot be contracted away, and the economic interest of the state may justify the exercise of its continuing protective power notwithstanding interference with existing contracts").

Even under traditional contract impairment analysis, therefore, Liberty Mutual's oft-repeated conclusion – that the Court's action if taken by the legislature would be constitutionally invalid – is subject to serious doubt. The Contracts Clause simply cannot serve as a basis for invaliding the *Spaulding* Opinion.

2. Due Process Generally

In response to Liberty Mutual's argument that the decision below constituted a retroactive imposition of civil

liability in violation of the Due Process Clause, the Court need only consider the plethora of cases in which courts routinely adjust the settled expectations of the contracting parties in the name of public policy. *See* page 13, *supra*. Furthermore, not every judicial interpretation of the law that allegedly "surprises" people amounts to a due process violation – not even in the criminal context where due process concerns are often heightened. In *Rogers v. Tennessee*, 532 U.S. 451 (2001), the Court refused to read the Ex Post Facto Clause into the Due Process Clause or to apply it to judicial decisionmaking. The Court recognized the "important institutional and contextual differences between legislating, on the one hand, and common law decisionmaking, on the other," cautioning against placing "unworkable and unacceptable restraint[s] on normal judicial processes" that would be "incompatible with the resolution of uncertainty that marks any evolving legal system." *Id.* at 460. As the *Rogers* Court explained, "[i]n the context of common law doctrines . . . there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves." *Id.* at 461. This has been true throughout the history of our common law courts:

> Common law courts at the time of the framing undoubtedly believed that they were finding rather than making law. But, however one characterizes their actions, the fact of the matter is that common law courts then, as now, were deciding cases, and in doing so were fashioning and refining the law as it then existed in light of reason and experience. Due process clearly did not prohibit this process

> of judicial evolution at the time of the framing, and it does not do so today.

Id. at 462.

The *Rogers* Court's explanation of the function of state courts applies equally to the decision of the New Jersey Supreme Court in this case. That Court examined an evolving area of the common law and adjudicated what it believed to be the logical extension of its existing precedents. A fair reading of the line of cases starting with *Owens-Illinois* in 1994 leads to the conclusion that the New Jersey Supreme Court's decision was neither "unexpected" nor "indefensible" such that it offended due process principles. *Cf. Rogers*, 532 U.S. at 465 (reviewing Tennessee precedents and concluding that "[t]hese cases hardly suggest that the Tennessee court's decision was 'unexpected and indefensible' such that it offended the due process principle of fair warning articulated in *Bouie* and its progeny.") In short, there is nothing to indicate that the New Jersey Supreme Court's extension of its decision in *Owens-Illinois* "represented an exercise of the sort of unfair and arbitrary judicial action against which the Due Process Clause aims to protect." *Rogers*, 532 U.S. at 467.

B. The New Jersey Supreme Court's *Spaulding* Opinion Does Not Violate the Takings Clause

In a single paragraph in the Petition, citing one "Takings Clause" case, Liberty Mutual argues that the *Spaulding* Opinion below violates the Takings Clause "for essentially the same reasons it violates due process."[4] Pet. at 24.

4. The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amdt. 5.

Caldwell Trucking submits that the *Spaulding* Opinion does not effect an unconstitutional "taking" for the same reasons it does not violate due process. As a preliminary matter, the "takings" issue was not timely raised (*see* Point I, *supra*) and should be deemed waived. As to the merits, Liberty Mutual has not and cannot cite to any Supreme Court precedent whereby the effect of a state court decision allocating property between private parties was held to constitute an unconstitutional taking; there simply is not any such precedent. As the New York Appellate Division observed in rejecting a "takings" challenge to a trial court decision, "[a] regulatory taking challenge is not generally applicable to a court's interpretation of statutes or regulations, or to any burdens imposed as a result of the court's decision; rather, such a challenge is typically directed at statutes or regulations which restrict the use of property." *Save the Pine Bush, Inc. v. Common Council of the City of Albany*, 188 A.D.2d 969, 971, 591 N.Y.S.2d 897, 899 (App. Div. 1992) (citing cases).

Put differently, as explained by the District Court for the District of Columbia,

> the Supreme Court has intimated, without ever squarely holding, that a court may effect an unconstitutional taking by force of judgment when it arbitrarily reverses precedent and awards property ***to the state***. The Supreme Court has also recognized that a ***legislative body*** effects an unconstitutional taking when it transfers property, ***without any justifying public purpose***, from one private party to another. [Citations omitted.] It does not necessarily follow, however, that a court effects an unconstitutional taking when its judgment results in the transfer of private property

> to another private party, even if based on erroneous reversal of precedent.

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Hodel, 637 F. Supp. 1398, 1406-07 (D.D.C. 1986) (emphasis added), *aff'd*, 830 F.2d 374, 381 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988). Indeed, "unlike a legislature, a court allocates property between individual private parties almost every time it acts in a civil case. In many of those cases, a court must reconsider the applicable precedents. To paraphrase Justice Holmes, the court could not go on if to some extent values incident to property could not be diminished without paying for every change in legal precedent." *Id.* at 1407.

In sum, "only where the property is taken by a court for the public . . . or by the legislature for another private party, with or without a justifying public purpose . . . is the takings clause implicated." *Id.* (citations omitted). The only case cited by Liberty Mutual, *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), which spawned five separate opinions, adjudicated the constitutionality of a legislative act – a federal statute – affecting benefits for coal miners. Because no property was taken by the New Jersey Supreme Court for the public, and because the Court's decision merely adjudicated the rights of two private parties over property (money), the Takings Clause does not apply at all, let alone to invalidate the *Spaulding* Opinion. By constitutionalizing a private party conflict, Liberty Mutual asks this Court not only to take away from the state judiciaries cases that have always been their domain, but, at the same time, to open the floodgates that have always limited federal court review of state contract cases. Liberty Mutual's blurring of federal/state jurisdiction would reverse a century of jurisprudence in this country . This Petition should therefore not be reviewed.

CONCLUSION

For the foregoing reasons, the Caldwell Trucking PRP Group respectfully requests that the Court deny Liberty Mutual Insurance Company's Petition for a Writ of Certiorari to the Supreme Court of New Jersey.

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No. 03-638

IN THE

Supreme Court of the United States

LIBERTY MUTUAL INSURANCE CO.,
Petitioner,

v.

CALDWELL TRUCKING PRP GROUP,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As the petition explained, this case raises the important question "whether there are any federal constitutional limits on the power of a state supreme court to nullify, retroactively, the unambiguous contractual rights of a private party." Pet. 2. That question lies at the heart of this case – and the petition for certiorari – but the brief in response of Caldwell Trucking PRP Group ("PRP") makes no attempt to address any element of it. That is, PRP does not deny that the non-cumulation clause at issue in the insurance contracts of petitioner Liberty Mutual Insurance Co. ("Liberty") is an unambiguous limitation on the liability that Liberty agreed, more than twenty years ago, to assume for multiple-year occurrences. PRP does not deny that the decision below nullifies that limitation. PRP does not deny that, in so doing, the decision imposes a wholly retroactive, manifold increase (from $1 million to more than $8 million) in the potential liability for which Liberty could now be financially responsible for a single occurrence. Finally, and most important, PRP does not even deny that, as a result of all the foregoing, the decision below raises serious questions about whether the federal Constitution constrains the decisionmaking processes of state courts in any respect.

Indeed, PRP's basic substantive response to the federal issues raised in the petition is that the Constitution simply does *not* impose any such constraints, leaving state courts free to revise private contracts in the name of public policy and to impose enormous retroactive monetary liabilities. State courts have such power, PRP says, simply because they are *courts*. Liberty, by contrast, recognizes that courts must have some leeway to mold the law as they apply it, but, in our view, the courts still must apply *the law*. The decision below is not law – it is an arbitrary and confiscatory exercise of raw state power. Liberty and its insured entered into contracts which explicitly limited the amount of risk accepted by Liberty for an injury that occurs over time. Twenty years

later, the State of New Jersey decided not to honor the deal the parties had made on the ground that more pollution would be cleaned up in the state had Liberty not limited its liability. Whether it is the act of the executive, the legislative, or the judicial branch of the state, the harm to Liberty is the same. Certiorari should be granted.

I. THE FEDERAL ISSUES RAISED IN THE PETITION ARE PROPERLY BEFORE THIS COURT

PRP's first response to the federal questions raised in the petition is to try to avoid them. This effort is unavailing.

This Court will consider a federal claim in a case seeking review of a state court judgment if the claim was properly presented to the state court that rendered the decision to be reviewed. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam). That standard has been met here. The Due Process and Takings issues raised in the petition were specifically argued in Liberty's motion for reconsideration before the New Jersey Supreme Court. *See* Pet. App. 58a-65a. This Court has long recognized that "[t]here is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." *Herndon v. Georgia*, 295 U.S. 441, 444 (1935). The federal questions presented in the petition were raised only because the New Jersey Supreme Court did what it had always said it would never do – rewrite an insurance contract by retroactively voiding an unambiguous liability limitation in that contract in order to maximize coverage. And certainly no decision had ever done so twenty years after the policies had expired, undoing expectations settled literally for decades.

In 1976, when Liberty issued the first of the insurance policies at issue, it had "long been the law of [New Jersey] that the court is bound to enforce the policy as it is written." *Flynn v. Hartford Fire Ins. Co.*, 370 A.2d 61, 63-64 (N.J. Super., App. Div.), *certif. denied*, 379 A.2d 236 (N.J. 1977).

This fundamental principle was consistently applied in a long line of New Jersey cases throughout the period of Liberty's coverage up to the decision of the court below. These decisions recognized that courts "cannot ... write for the insureds a better insurance policy than the one bargained for and purchased." *Id.* Consistent with this rule, New Jersey courts had "adhered to the principle that an insurance policy should generally be interpreted 'according to its plain and ordinary meaning,' ... so as not to disregard the 'clear import and intent' of a policy exclusion" or provision. *American Motorists Ins. Co. v. L-C-A Sales Co.*, 713 A.2d 1007, 1013 (N.J. 1998) (internal citations omitted). Before the decision below, New Jersey courts understood that ignoring policy limitations "constitutes an unbargained-for expansion of coverage, *gratis*, resulting in the insurance company's exposure to a risk substantially broader than that expressly insured against in the policy." *Zuckerman v. National Union Fire Ins. Co.*, 495 A.2d 395, 406 (N.J. 1985).

As PRP notes, the decision below was explicitly based on *Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974 (N.J. 1994). But as explained in the petition (Pet. 4-7, 13-4), nothing in *Owens-Illinois* suggested that courts were permitted to ignore contract language that directly addressed the handling of the claim at issue. To the contrary, the New Jersey Supreme Court acknowledged explicitly in *Owens-Illinois* that "[t]he source of any duty on the part of the Insurance Companies to defend actions or to pay any judgments is obviously in the contract of insurance." *Id.* at 978. As a result, the *Owens-Illinois* decision rested squarely upon its finding that the policy language under consideration in that case was simply inapplicable to allocation issues involving successive policies: "We are unable to find the answer to allocation in the language of the policies." *Id.* at 990. What the court in this case found controlling in *Owens-Illinois* was its reliance on a public policy of maximizing insurance coverage for environmental cleanup, Pet. App. 23a, even though

the *Owens-Illinois* Court actually found that "[a] rule of law premised on nothing more than the result-oriented goal of maximizing coverage has been described as judicial legislation. A more consistent principle is required." 650 A.2d at 981 (internal quotation marks omitted). In contrast to the decision below nullifying contractual language on the basis of such a public policy, the *Owens-Illinois* court had adverted to public policy as a basis for decisionmaking only after first finding that the insurance contract language did not answer the question at issue. *Id.* at 992.

Contrary to PRP's submission, the decision of the court below to retroactively nullify Liberty's non-cumulation clause on the basis of *Owens-Illinois* was *not* a predictable outcome, which Liberty should have anticipated by chocking its appellate briefs full of federal constitutional arguments. Before the decision below, the issue being litigated was not whether *Owens-Illinois nullified* the non-cumulation clause; the issue was how the clause should be *interpreted* in light of *Owens-Illinois*. This was because in setting out the continuous trigger theory, the *Owens-Illinois* court had stated that "when progressive indivisible injury or damage results from exposure to injurious conditions for which civil liability may be imposed, courts may reasonably treat the progressive injury or damage as an occurrence within each of the years of a CGL policy." *Id.* at 995. What the trial court held – and what PRP argued at both levels of appeal – was that the quoted statement constituted a definitive ruling that progressive property damage is to be treated as separate occurrences in each year of a triggered insurance policy, thus rendering the non-cumulation clause, which applies only when there has been a single occurrence, inapplicable by its terms. Thus the argument as presented to the courts by both sides was simply whether *Owens-Illinois* should be read as having determined that long-term environmental contamination must be treated as a separate, distinct occurrence in each year.

The New Jersey Supreme Court unexpectedly took the argument in a different direction. Although it mentioned the argument discussed above, Pet. App. 21a-22a, the court went out of its way to make clear that the true basis for its holding was that the non-cumulation clause was *unenforceable* "because it would thwart the *Owens-Illinois* pro-rata allocation modality," Pet. App. 22a: "Our *sole determination* in this case," the court stated, "is that Liberty's non-cumulation clause is unenforceable under *Owens-Illinois*." *Id.* at 24a (emphasis added); *see id.* ("the conflict between *Owens-Illinois* and Liberty's non-cumulation clause is the basis for our holding"). "Once the court turns to pro rata allocation [as it did in *Owens-Illinois* for the public policy reason of maximizing insurance coverage]," the court explained, a limitation on liability as fundamental as a non-cumulation clause must, as a matter of law, "drop[] out of the policy." *Id.* at 22a. The argument that the non-cumulation clause should simply be erased from the insurance contract, for the judicially created policy reason of increasing available insurance funds, had not previously been raised in the litigation. Accordingly, it was only when the New Jersey Supreme Court reached that unexpected and unprecedented conclusion that the federal issues presented here crystallized.[1] Liberty

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[1] To the extent the court expressed agreement with the view that the non-cumulation clause may be *interpreted*, consistent with *Owens-Illinois*, as not applying to this situation, those comments are not an independent ground for its judgment in this case. As noted, the court's central conclusion – its "sole determination" – is that *Owens-Illinois* forces the non-cumulation clause to "drop[] out of the policy." That conclusion rests on the ground that the public policy discussion in *Owens-Illinois* speaks to insurance policies with clear provisions establishing multiple-year occurrence liability limits. The conclusion that *Owens-Illinois* affects the *interpretation* of such provisions – as opposed to the underlying *enforceability* of such provisions – rests on the same ground. Thus, if the court had not reached its fundamental holding that *Owens-Illinois* simply nullified the non-cumulation clause, the court likely would not have found the clause to be inapplicable here.

promptly brought them to the attention of the New Jersey Supreme Court, which declined to revise its opinion or judgment. Liberty has now brought them before this Court, which has every right – and every reason – to hear them.

II. THE DECISION BELOW PRESENTS IMPORTANT FEDERAL ISSUES

PRP argues that because the decision below was "grounded exclusively in state court precedents and public policy considerations," Br. Opp. 12, it raises no federal issue worthy of review. The conclusion does not follow from the premise. Liberty has never denied that the decision below rests on state law and on the public policy of increasing funds available for environmental clean-up. But that is precisely the problem. It is equally true that a statute enacted by the legislature accomplishing the same confiscatory result as the decision below would be a "state law" based on "public policy." Such a statute obviously would present compelling federal questions. And the basic federal issue presented here is whether those federal questions are precluded merely because the decision below was issued by a panel of judges in court rather than enacted by legislators in session.

It is also wrong to say, as PRP does, that the decision below presents no conflict with decisions enforcing unambiguous contractual provisions because "the cases are legion in which unambiguous contract provisions are deemed unenforceable on public policy grounds." Br. Opp. 13. As PRP admits (*id.*), Liberty has never contended otherwise. We do not deny the "pervasiveness and acceptability of judicial review of private contracts," nor do we challenge "the right of courts to declare contractual provisions unenforceable in the public interest." Br. Opp. 14. The issue here is whether there is any limit whatsoever on the right of courts to do so.

The decision below did not declare the non-cumulation clause unenforceable because it required unlawful conduct, or because it imposed an unconscionable bargain between

insurer and insured, or because it imposed unfair obligations on the insured – all recognized bases for refusing to enforce contractual provisions as contrary to the public interest. And while courts also refuse to enforce contracts as being contrary to more ephemeral notions of "public policy," this Court has made clear that "public policy" does not give courts an open-ended license to rewrite private contracts:

> The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts. . . . The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests.
>
> . . . .
>
> [A contract] may not be held invalid, in the absence of a clear showing that some definite public interest will probably result from its performance.

Twin City Pipeline Co. v. Harding Glass Co., 283 U.S. 353, 356-58 (1931). In accordance with that rule, courts traditionally have tied refusals to enforce a contract on public policy grounds to some pre-existing, clearly settled public policy. For instance, courts long ago refused to enforce agreements to indemnify for the indemnitee's own acts of negligence because courts believed that shifting away financial liability for the consequences of negligent conduct would eliminate the deterrent effect of such liability and thereby encourage negligent acts. *See* W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 82, at 585 (5th ed. 1984). Many courts today still refuse to enforce insurance policies as to acts of intentional misconduct for much the same reason. *See* Robert E. Keeton & Alan I. Widiss, *Insurance Law* § 5.4(d)(1), at 519 (1988). In either instance, the strong societal interest in deterring harmful conduct is a

"definite" public policy that courts could meaningfully apply in the enforcement of insurance contracts.

Here the asserted public policy is quite different: it is nothing more or less than an interest in making insurance companies pay more money to polluters, so that the latter can more easily cover the costs of the harms they have caused. As the petition demonstrates and PRP nowhere denies, the decision below is the same in substance as a decision holding that a clear $1 million liability limitation should be changed to $10 million, merely so the insurer can be made to pay ten times as much money toward environmental remediation. In other words, if the public policy identified in *Owens-Illinois* and applied here can support the nullification of the non-cumulation clause, then it should in theory be able to support nullification of *any* liability limitation. We are aware of no precedent anywhere applying "public policy" to so radically alter contractual obligations, and PRP cites none.

It is for these reasons that review of the decision below would not "open the floodgates" to review of state court decisions on state-law contract issues. Br. Opp. 15. Review here would, rather, serve as an important signal to state courts that, while considerations of public policy are and should be part of the common-law development of contract law, that process must remain one of *law*, not of confiscatory judicial legislating. On the other hand, the fact that the New Jersey Supreme Court decision is admittedly extreme should not insulate it from review on the ground that it is a "one-ticket, one-ride" decision with no broader consequences. As the amicus brief of the Complex Insurance Claims Litigation Association and the American Insurance Association confirms, the New Jersey Supreme Court's decision will have enormous effects on insurers in New Jersey and elsewhere. CICLA/AIA Br. 17. And the broader precedent it sets with respect to the power of courts to rewrite freely bargained, private contracts on the basis of public policy likely will be

felt even beyond the insurance industry. In short, it is very much the extreme and unprecedented nature of the decision that makes it so important, and the need for review so urgent.

III. THE DECISION BELOW VIOLATES THE DUE PROCESS AND TAKINGS CLAUSES

We need not at this jurisdictional stage belabor the merits of the federal questions presented by the decision below. Only a few points raised by PRP merit response.

PRP contends that the decision below does not contravene the Contracts Clause principles embedded in the Due Process Clause (Pet. 17-21) because the nullification of the non-cumulation clause was "'necessary' to serve a 'significant and legitimate public purpose.'" Br. Opp. 17 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 505 (1987)). PRP also suggests that there would be no Contracts Clause violation here if the decision below were an act of the New Jersey legislature because insurance is a "heavily regulated industry." *Id.* at 18. Both arguments prove too much: if the mere fact that a state wanted more money to pay for environmental clean-up or that insurance is a heavily regulated business sufficed to justify the egregious contractual impairment at issue here, then the Contracts Clause would impose no limits at all on such impairments.

Much the same is true for PRP's argument that the decision below does not constitute an unconstitutionally excessive and unfair imposition of retroactive monetary liability. We agree that due process "d[oes] not prohibit th[e] process of judicial evolution," Br. Opp. 20-21 (quoting *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001)), but that is not the question here. The question is whether due process imposes any limits at all on the extent to which a court may, in the process of "fashioning and refining the law," *Rogers*, 532 U.S. at 462, completely unmake long settled contractual expectations. If the courts' power to apply an "evolving" law

suffices to justify the decision below, then, again, there are effectively no constitutional limits on that process at all.

While PRP appears to believe that due process imposes no constraints at all on the retroactive application of law newly made by state courts, PRP does argue that the decision below would not transgress such limits in any event, because a "fair reading of the line of decisions *starting with Owens-Illinois in 1994* leads to the conclusion that the New Jersey Supreme Court's decision was neither 'unexpected' nor 'indefensible' such that it offended due process." Br. Opp. 21 (emphasis added). Although we certainly disagree that *Owens-Illinois* foreshadowed the decision below, *see* Pet. 4-7, 13-14, PRP's argument misses a more fundamental point: whatever result may have been predictable *after Owens-Illinois* was decided in 1994, the contracts at issue here were completed *more than 10 years earlier*. Even PRP does not contend that, when the parties signed the insurance agreements at issue in this case, it was even remotely predictable that the New Jersey Supreme Court would declare the non-cumulation clause unenforceable more than a decade later.

Finally, PRP argues that the decision below does not violate the Takings Clause because the Clause is categorically inapplicable to state actions that only transfer money from one private party to the other, rather than take property for the public. Br. Opp. 23. That argument runs squarely contrary not only to *Eastern Enterprises v. Apfel*, 524 U.S. 498, 528 (1998) (plurality opinion), but also to this Nation's most settled constitutional traditions, *see Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.) ("It is against all reason and justice" to presume that the legislature has been entrusted with the power to enact "a law that takes property from A. and gives it to B[.]"). The decision below contradicts those same traditions.

CONCLUSION

For the foregoing reasons, the petition should be granted.

(4)

No. 03-638

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In The
Supreme Court of the United States

LIBERTY MUTUAL INSURANCE CO.,

Petitioner,

v.

CALDWELL TRUCKING GROUP PRP,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF; AND *AMICI CURIAE* BRIEF OF THE COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION AND AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Complex Insurance Claims Litigation Association ("CICLA") and the American Insurance Association ("AIA") submit this motion for leave to file an *amici curiae* brief in support of Petitioner Liberty Mutual Insurance Company ("Petitioner") pursuant to Supreme Court Rule 37.2(b). The *amici curiae* brief of CICLA and AIA presents relevant information beyond the scope of the submissions of the parties to this case and focuses on the potential significance of this case to numerous others beyond the Petitioner and the Respondent. Through their participation, CICLA and AIA seek to provide "unique information or perspective that can help the court." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997); *see also Miller-Wohl Co. v. Comm'r of Labor and Indus.*, 694 F.2d 203, 204 (9th Cir. 1982) ("the classic role of *amicus curiae* [is to] assist[ ] in a case of general public interest, supplement[ ] the efforts of counsel, and draw[ ] the court's attention to law that escaped consideration").

As required by Supreme Court Rule 37.2(a), CICLA and AIA sought the consent of the parties to file this *amici curiae* brief. Petitioner consented to the filing of a brief by *amici curiae* CICLA and AIA.[1] This motion is necessary, however, because Respondent Caldwell Trucking Group PRP ("Respondent") withheld its consent to the appearance of CICLA and AIA as *amici curiae*.

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[1] The letters from counsel for Petitioner consenting to the filing of this brief *amici curiae* have been filed in the office of the Clerk.

CICLA is a national association of insurers, whose members underwrite a substantial portion of the liability insurance in the State of New Jersey and across the nation. CICLA frequently represents the interests of its members as an *amicus curiae* in federal courts. Indeed, CICLA – and its predecessor the Insurance Environmental Litigation Association – have filed over 600 briefs *amicus curiae*. In addition, CICLA participated in this case as an *amicus curiae* before the New Jersey Supreme Court. CICLA is therefore uniquely situated to assess and explain the potential ramifications of the New Jersey Supreme Court's decision for insurers throughout the country.[2]

The American Insurance Association, founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing over 400 companies writing property and casualty insurance in every state and jurisdiction of the United States. The purposes of AIA are to promote the economic, legislative, and public standing of its members; to provide a forum for discussion of policy problems of common concern to its members and the insurance industry; to keep members informed of regulatory and legislative developments; and to serve the public

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[2] This brief is submitted on behalf of CICLA member companies Farmers Insurance Group, Hartford Insurance Group, Royal & SunAlliance, Selective Insurance Company of America, St. Paul Fire & Marine Insurance Company, The Travelers Indemnity Company, and Zurich American Insurance Company. This brief is not submitted on behalf of CICLA member companies ACE Group of Insurance and Reinsurance Companies, American International Group Insurance Companies, Chubb & Son – a division of Federal Insurance Company, or Continental Casualty Company. Although Petitioner is a member of CICLA, it has not contributed financially to the preparation or submission of this brief, and this brief is not submitted on its behalf.

interest through appropriate activities including the promotion of safety and security of persons and property. AIA is headquartered in Washington, D.C., maintains five regional offices, and retains legislative counsel in every state. Among its other activities, AIA files *amicus curiae* briefs in cases before state and federal courts on issues of importance to the insurance industry.

CICLA's and AIA's members have a vital interest in the legal issues presented by this case. This *amici curiae* brief focuses on the question whether the New Jersey Supreme Court, or any other court, has the authority to disregard clear language in a contract of insurance absent a compelling competing interest. This question is of the utmost importance to CICLA's and AIA's members and to the insurance community at large. CICLA and AIA submit this brief to demonstrate that the opinion of the New Jersey Supreme Court threatens the due process rights of the parties to a contract, as well as long-standing common law and state law principles of contract interpretation. The analysis presented by this *amici curiae* brief extends beyond the scope of the applicability and enforceability of the specific contract provision, the non-cumulation clause in Petitioner's insurance policy, which is at issue in this case and which is at the heart of the arguments set forth by the Petitioner and the Respondent.

CICLA and AIA submit this brief to supplement the presentations of the parties and provide a national perspective from the insurer's standpoint on the potential impact of the New Jersey Supreme Court's decision in this case. Certiorari is necessary to correct the erroneous decision of the New Jersey Supreme Court and to prevent the violation of due process and the erosion of well established principles of contract law that may occur if the

decision of the New Jersey Supreme Court is allowed to stand. In light of the implications of this case for the members of CICLA and AIA and the insurance industry at large, CICLA and AIA respectfully request leave of the Court to file the attached *amici curiae* brief in support of Petitioner.

Respectfully submitted,

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BRIEF OF COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION AND AMERICAN INSURANCE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

This *amici curiae* brief is submitted on behalf of the Complex Insurance Claims Litigation Association ("CICLA") and American Insurance Association ("AIA"). Petitioner Liberty Mutual Insurance Co. has consented to CICLA's and AIA's filing of this brief. Respondent Caldwell Trucking Group PRP has withheld consent. A motion for leave to file an *amici curiae* brief under Supreme Court Rule 37.2(b) is included with this brief. The letters from counsel for Petitioner consenting to the filing of this *amici curiae* brief have been filed in the office of the Clerk.

INTEREST OF *AMICI CURIAE*[1]

The Complex Insurance Claims Litigation Association is a trade association of major property and casualty insurance companies.[2] CICLA is vitally interested in this

[1] This brief was not authored, in whole or in part, by any counsel for any party. No person or entity, other than the *amici curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] This brief is submitted on behalf of CICLA member companies Farmers Insurance Group, Hartford Insurance Group, Royal & SunAlliance, Selective Insurance Company of America, St. Paul Fire & Marine Insurance Company, The Travelers Indemnity Company, and Zurich American Insurance Company. This brief is not submitted on behalf of CICLA member companies ACE Group of Insurance and Reinsurance Companies, American International Group Insurance Companies, Chubb & Son – a division of Federal Insurance Company,

(Continued on following page)

case because its members underwrite a substantial portion of the liability insurance in the State of New Jersey and nationwide. The American Insurance Association is a national trade organization representing more than 400 companies writing property and casualty insurance in every state and jurisdiction of the United States. AIA companies are affiliated with 79,000 independent insurance agents nationwide. The purposes of the AIA are to promote the economic, legislative and public standing of its members and the insurance industry; to provide a forum for discussion of problems which are of common concern to its members; to keep members informed of regulatory and legislative developments; and to serve the public interest through appropriate activities including the promotion of safety and security of persons and property. Thus, the outcome of this case has far-reaching implications for AIA's members.

In this case, the New Jersey Supreme Court abrogated a clear contractual limitation because it conflicted with what the court broadly deemed to be in the public interest. Furthermore, the legal precedent established by *Spaulding Composites Co. v. Aetna Casualty & Surety Co.*, 819 A.2d 410 (N.J. 2003), is applicable not just to the contract provision that was invalidated in that case by the Supreme Court of New Jersey; it will be cited to justify invalidating other unambiguous provisions in insurance and other types of commercial contracts in violation of the contracting parties' due process rights.

Continental Casualty Company, or Liberty Mutual Insurance Company (hereinafter referred to as "Liberty Mutual").

As a result of their broad memberships and extensive experience as advocates for insurers nationwide, CICLA and AIA offer a broader perspective than the parties on the potential impact of the issues presented here. Allowing a court to disregard plain insurance contract language in favor of perceived public interest concerns could have a material negative effect on the insurance industry. At the expense of constitutionally-protected reliance interests, the decision below introduces uncertainty – and potential bias – into the enforcement of insurance contract terms. This, in turn, may affect the affordability and availability of insurance coverage.

Through participation as an *amici curiae*, CICLA and AIA seek to supplement the presentations of the parties and provide a national perspective from the insurers' standpoint on the potential impact of this New Jersey Supreme Court decision. Since its inception in 1986, CICLA – and its predecessor, the Insurance Environmental Litigation Association – have filed over 600 briefs *amicus curiae* in complex insurance cases. As a national trade organization, AIA has special expertise in, and knowledge of, disputes concerning insurance coverage and extensive experience in addressing issues of contract interpretation related to property insurance issues. Therefore, CICLA and AIA are uniquely situated to assess and explain the potential ramifications of the New Jersey Supreme Court's decision for cases throughout the country, as well as the ultimate effect of that decision on the nation's insurance coverage market.

SUMMARY OF ARGUMENT

This case does not present a one-time question of contractual interpretation, and it is not a challenge to a state court's effort to discern the meaning of ambiguous contract language. Instead, it addresses an assault by a state high court on the sanctity of contract itself. In this case, the New Jersey Supreme Court expressly substituted what it thought to be "fair" for that which was contractually agreed. In so doing, it violated the due process rights of the Petitioner and abandoned generations of established contract law precedent.

Contract interpretation is a matter of law. If the New Jersey Supreme Court's decision is allowed to stand, however, it will be relied upon to justify departure from clear contract terms in insurance and other commercial agreements whenever a court believes a different result is more equitable. This case's genesis in commonplace commercial litigation between two companies should not conceal the fact that it presents a significant repudiation of courts' duty to enforce contracts as written.

ARGUMENT

I. THE CONSTITUTION REQUIRES COURTS TO ENFORCE CONTRACTS AS THEY ARE WRITTEN AND OUR COMMERCIAL SYSTEM DEPENDS UPON JUDICIAL RESPECT FOR THIS PRINCIPLE.

In *Spaulding*, the New Jersey Supreme Court set aside unambiguous language in an insurance contract because, in its view, the policy, as written, was not "fair." 819 A.2d at 422. In so doing, the New Jersey Supreme

Court forthrightly stated that one of its prior decisions "eliminated reliance on particular contract language (other than limits and exclusions) and on traditional rules of interpretation." *Id.* at 420. The New Jersey Supreme Court's decision is a dramatic and ultimately dangerous departure from long-standing rules of contract interpretation.

As this Court long-ago held, "[t]he general rule is that competent persons shall have the utmost liberty of contracting and . . . their agreements voluntarily and fairly made shall be held valid and enforced in the courts." *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931). This principle, grounded in the Contract Clause of the U.S. Constitution, U.S. Const. art. I, § 10, cl. 1, and in constitutional guarantees of due process, U.S. Const. amend. V and XIV,[3] applies fully to insurance contracts:

> As a general rule, parties to a contract are bound by its provisions and an insured is entitled only to the coverage for which he contracted; it is not the function of a court to rewrite insurance policies so as to provide coverage which the court might have considered more equitable.

Cornellier v. Am. Cas. Co., 389 F.2d 641, 644 (2d Cir. 1968). Thus, both the U.S. Constitution and settled principles of contract law forbid courts from abrogating contract terms absent compelling reasons in limited circumstances.

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[3] *See* Petition for Writ of Certiorari at 17-21, *Liberty Mut. Ins. Co. v. Caldwell Trucking PRP Group*, No. 03-638, for a more detailed analysis of the Contract Clause and due process implications of this case.

When courts disregard clear contract limitations on the scope of an insurer's liability, they are departing from the settled principles of contract law and due process that guarantee parties the right to enter into contracts and to rely on courts to enforce their terms. Further, when a court fails to adhere to these principles – as the New Jersey Supreme Court did in *Spaulding* – it not only harms the litigant in that case, it also undercuts the entire system of liability insurance. As one court has stated:

> [O]ur commercial system depends on the ability of parties to contract with certainty. Were courts free to refuse to enforce contracts as written on the basis of their own conceptions of the public good, the parties to contracts would be left to guess at the content of their bargains, and the stability of commercial relations would be jeopardized. . . . The insurance contract . . . represents a conscious calibration of risks. [The insured] bargained with [the insurer], and paid premiums to [the insurer], on the basis of the allocation of risk in the policy as written. The [lower] court's decision, however, negates their bargain and leaves the parties guessing as to how the courts will decide a question on which, as the authorities cited by the district court make clear, reasonable minds may differ. . . . [Such a result] would destroy to a large extent the certainty on which our commercial system depends.

St. Paul Mercury Ins. Co. v. Duke Univ., 849 F.2d 133, 135-37 (4th Cir. 1988).

Contract interpretation – including the interpretation of insurance policies – is a matter of law, not of equity. *Oritani Sav. & Loan Ass'n v. Fid. & Deposit Co.*, 989 F.2d 635, 638 (3d Cir. 1993). Thus, while it is true that certain equitable considerations, such as public policy, may be

weighed in the context of contractual disputes, public policy may be relied upon to override contract language only in very limited contexts and only for compelling reasons.

This Court has made clear that the right to override contract language in favor of public policy considerations is a narrow one. As this Court held,

> The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests. . . . [Contract language] may not be held invalid, in the absence of a clear showing that some definite public detriment will probably result from its performance.

Twin City, 283 U.S. at 356-58. In *Patton v. United States*, 281 U.S. 276, 306 (1930), the Court recognized that "the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection."

Public policy considerations are sufficient to override clear contract language only in rare settings implementing fundamental public health, safety, moral concerns, or welfare. "A court may proclaim itself to be the voice of the public only when 'a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it.'" *Shelby Cas. Ins. Co. v. Statham*, 158 F. Supp. 2d 610, 614 (E.D. Pa. 2001) (declining to invalidate insurance policy provision on public policy grounds) (quoting *Mamlin v. Genoe*, 17 A.2d 407, 409 (Pa. 1941)). *See also Cont'l Cas. Co. v. Allen*, 710 F. Supp. 1088,

1098 (N.D. Tex. 1989) (declining to find insurance contract provisions violative of public policy); *United States v. King*, 840 F.2d 1276, 1283 (6th Cir. 1988) (contract by which parents consented in advance to the physical abuse of their children void as against public policy); *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548 (3d Cir. 2002) (doctrine of public policy voids a contract term that violates laws against racial discrimination); *Fid. & Deposit Co. v. Conner*, 973 F.2d 1236, 1241 (5th Cir. 1992) (enforcing a regulatory exclusion in an insurance contract because "[a]lthough contractual agreements may be invalidated on grounds of public policy, public policy opens only a narrow exception within this general rule – an exception to be applied cautiously and only in plain cases involving dominant public interests.").

State courts, including New Jersey's, have articulated similar standards for the consideration of when "public policy" may nullify contract terms. Under principles articulated by New Jersey courts in the past, invalidating the unambiguous language of a contract on public policy grounds requires a high and unusual showing: the clause must be "patently offensive or inimical to the public welfare and have a clear capacity to support or encourage conduct which is deleterious, anti-social or unlawful." *Rotwein v. Gen. Accident Group*, 247 A.2d 370, 376 (N.J. Super. Ct. Law Div. 1968), *quoted in Zuckerman v. Nat'l Union Fire Ins. Co.*, 495 A.2d 395, 401 (N.J. 1985); *see also Summit Assocs., Inc. v. Liberty Mut. Fire Ins. Co.*, 550 A.2d 1235, 1239 (N.J. Super. Ct. App. Div. 1988) (reversing and quoting trial court holding that "the health, safety and welfare of the people of this State must outweigh the express provisions of the insurance policy in issue").

In the specific context of environmental insurance coverage, the New Jersey Supreme Court in *State v. Signo Trading International, Inc.*, 612 A.2d 932, 940 (N.J. 1992), said that "public policy considerations alone are not sufficient to permit a finding of coverage in an insurance contract when its plain language cannot fairly be read to provide that coverage." The California Supreme Court similarly has held: "While we agree that it is in everyone's best interests to have hazardous wastes cleaned up, we do not agree that a . . . court may rewrite an insurance policy for that purpose or any purpose." *Rosen v. State Farm Gen. Ins. Co.*, 70 P.3d 351, 356 (Cal. 2003) (internal citations omitted). Moreover, "there is a strong public policy in favor of allowing insurers to enforce unambiguous policy provisions, thereby encouraging stability in the insurance industry and allowing insurers the benefit of the bargain created by such unambiguous language." *Id.* at 359 (Moreno, J., concurring). Most courts agree. *See, e.g.*, *Slayko v. Sec. Mut. Ins. Co.*, 774 N.E.2d 208, 211-12 (N.Y. 2002) (Courts should be "reluctant to inhibit freedom of contract by finding insurance policy clauses violative of public policy") (internal citations omitted); *Prudential Prop. & Cas. Ins. Co. v. Jefferson*, 185 F. Supp. 2d 495, 498 (W.D. Pa. 2002) (rejecting argument that household exclusion provision in automobile insurance contract violates public policy).

Here, however, the New Jersey Supreme Court invalidated an insurance policy term without any explanation of why it was appropriate to depart from settled constitutional and contract principles. Rather than honor the bedrock principles protecting parties' right to contract as they see fit and the reliance interests of Petitioner, the *Spaulding* court simply imposed its own view of what

would be the "right" result in a contractual insurance coverage case.

II. THE NEW JERSEY SUPREME COURT DISREGARDED FUNDAMENTAL PRINCIPLES OF CONSTITUTIONAL DUE PROCESS AND CONTRACT LAW.

Almost twenty years after the parties entered into the insurance contracts at issue in *Spaulding*, the New Jersey Supreme Court essentially rewrote the agreed-upon terms of their insurance contracts as if crucial language governing the parties' rights and obligations had never existed. In nullifying language of the policy, the New Jersey Supreme Court disregarded the well-established framework requiring unambiguous contracts to be enforced according to their terms and overridden by public policy concerns only in highly unusual and limited circumstances.

Specifically, the New Jersey Supreme Court viewed the contract through the lens of one of its prior decisions, *Owens-Illinois, Inc. v. United Insurance Co.*, 650 A.2d 974 (N.J. 1994), and the court's previously articulated goal of maximizing insurance coverage for environmental cleanup.[4] The public policy considerations articulated in

[4] Perhaps the result in *Spaulding* was motivated by the Court's desire to extend the reach of its own earlier decision in *Owens-Illinois*. In *Spaulding*, the New Jersey Supreme Court pointed to its own decision in *Owens-Illinois* as an important ruling: "As scholars and treatise writers, without exception, have concluded, *Owens-Illinois* was a 'watershed' in the cripplingly complex area of long-tail environmental exposure insurance coverage." *Spaulding*, 819 A.2d at 419.

Owen-Illinois are insufficient to justify rewriting the language of the Liberty Mutual policy at issue in this case. *See Goodwin v. George Fischer Foundry Sys., Inc.*, 769 F.2d 708, 712 (11th Cir. 1985) (rejecting argument that state supreme court decision is "evidence of such a strong public policy that the [contract provision at issue] should not be applied"). The court cannot opt to ease the burden on New Jersey citizens or shift the cost of society's systemic problems (such as cleaning up pollution) to insurers by ignoring constitutional considerations requiring it to enforce the unambiguous terms of a contract. The New Jersey Supreme Court, like all courts, must be bound by the constitutional principles that permit public policy to override unambiguous contract language only after a searching analysis and in very narrow circumstances.

With stunning candor, the *Spaulding* court admitted that "even if the non-cumulation clause was not facially inapplicable, we would not enforce it because it would thwart. . . . a public policy that favors maximizing, in a fair and just manner, insurance coverage for cleanup of environmental disasters." *Spaulding*, 819 A.2d at 422. The court ultimately struck the clause to ensure, in its own estimation, that the Petitioner did not "avoid its fair share of responsibility" because "[b]y applying the non-cumulation clause, insurers who were actually 'on the risk' would be insulated from their fair share of liability." *Id.* But, the New Jersey courts, and other courts faced with deciding how to apply the unambiguous terms of insurance contracts, are not roaming the land of equity looking for a way to impose their own version of "fair"; they are resident in the land of law in which contracts are to be enforced.

Additionally, the result reached by the New Jersey Supreme Court does not comport with the common understanding of fairness or the constitutional guarantee of due process. It changed the scope of the insurer's liability from that prescribed by contract to what the court abstractly deemed to be "fair" without even a reference to a rule of law or a compelling justification. The Petitioner was "on the risk" for exactly the type of coverage provided in the policy and nothing more. The policy provision that the court erased did not authorize criminal conduct, implement racial discrimination or violate other important societal norms; it limited the amount the insurer can be called on to pay. The court's holding does exactly what New Jersey common law has counseled against: it "write[s] for the insured a better policy of insurance than the one purchased." *Harleysville Ins. Cos. v. Garitta*, 785 A.2d 913, 917 (N.J. 2001).

The New Jersey Supreme Court's departure from its own settled tenets of New Jersey contract law has deprived the Petitioner of millions of dollars without due process of the law. The Petitioner's settled expectation that the courts would interpret its insurance contracts as written is now nothing but wishful thinking. And, of course, Petitioner is far from alone.[5] All insurers now stand at risk that the New Jersey courts will henceforth

[5] Moreover, the due process harm to the Petitioner is not just limited to this case, but extends to every claim by every insured who paid a discounted price in exchange for the inclusion of a non-cumulation clause in their policy. Citing this case, other insureds will now seek to escape the limits of the non-cumulation clause of any insurance policy issued by the Petitioner.

alter their contracts to award policyholders extra-contractual coverage that judges feel to be "fair." Thus, the New Jersey Supreme Court's actions have made possible a recurring violation of federal due process principles that can be remedied only through this Court's review.

Indeed, the New Jersey high court previously has displayed a proclivity for departing from the clear terms of insurance policies to impose broad liability on insurers where none would otherwise exist. In *Morton International, Inc. v. General Accident Insurance Co.*, 629 A.2d 831 (N.J. 1993), *cert. denied*, 512 U.S. 1245 (1994), the New Jersey Supreme Court held unenforceable a standard pollution exclusion that had been part of many insurance agreements since 1970. The Court's decision in *Morton* was particularly egregious because it expressly "decline[d] to enforce the standard pollution exclusion clause as written" even though the New Jersey insurance regulators had approved the clause. 629 A.2d at 848.[6]

Decisions such as *Spaulding* and *Morton* are even more troubling because they signify a dramatic departure from the standards that New Jersey courts state must govern questions of contract interpretation. New Jersey

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[6] New Jersey, and most other states, have regulatory agencies that review insurance policy provisions. If the state is concerned about a particular provision, then the state is able to address the provision through its oversight mechanism. In what is already a heavily regulated industry, state court intervention in the vein of *Spaulding* is not only unnecessary, but can cause disruption. The *ex post facto* nature of judicial review necessarily means that when a court alters the terms of an insurance policy, it does so after the policy has been executed and relied upon.

courts have stated in the past that New Jersey insurance contract law requires parties to be bound by the plain terms of an insurance policy. *See Am. Motorists Ins. Co. v. L-C-A Sales Co.*, 713 A.2d 1007, 1013 (N.J. 1998) ("we adhere to the principle that an insurance policy should generally be interpreted according to its plain and ordinary meaning" (internal quotations omitted)); *Flynn v. Hartford Fire Ins. Co.*, 370 A.2d 61, 63 (N.J. Super. Ct. App. Div. 1977) ("when the policy of insurance is clear and unambiguous, it has long been the law of this State that the court is bound to enforce the policy as it is written"); *Harleysville Ins. Cos. v. Garitta*, 785 A.2d 913, 917 (N.J. 2001) ("In the absence of any ambiguity, courts should not write for the insured a better policy of insurance than the one purchased." (Internal quotations omitted)). New Jersey also claims to recognize that these contract interpretation principles are critically necessary to sustain the viability of the insurance industry. *See Zacarias v. Allstate Ins. Co.*, 775 A.2d 1262, 1270 (N.J. 2001) ("Insurance contracts are . . . issued to assist individuals to plan rationally for the unforeseen challenges of an unpredictable future. For such transactions to be sustainable, both sides must be able to rely on the plain meaning of the contracts into which they respectively enter."). Yet, somehow, despite these precedents, the decision of the New Jersey Supreme Court in *Spaulding* is only the latest in a series of decisions from this court that upend these long-settled principles and the contracts predicated on them in the name of "fairness" that allows New Jersey courts to impose large additional liabilities on insurers in sensitive, costly areas like environmental pollution based on the subjective preferences of judges.

This problem is also seen in other cases where judges are asked to hold insurers liable for costs of remedying a broad array of societal problems. For instance, *Spaulding* is analogous to the California lower court decisions in *Rosen v. State Farm General Insurance Co.*, 70 P.3d 351 (Cal. 2003), which addressed whether a homeowner's insurer whose contract terms covered the actual "collapse" of the insured property, or a part thereof, should be required to pay for repairs to avoid the imminent collapse of a deck. The trial court in *Rosen* declared that there should be coverage "for collapse as long as the collapse is imminent, *irrespective of policy language*." 70 P.3d at 353 (emphasis in original). The intermediate Court of Appeal agreed with the trial court and affirmed its decision. *See Rosen v. State Farm Gen. Ins. Co.*, 120 Cal. Rptr. 2d 373 (Cal. Ct. App. 2002). Ultimately, the California Supreme Court reversed, finding that: "In rewriting the coverage provision to conform to their notions of sound public policy, the trial court and the Court of Appeal exceeded their authority, disregarding the clear language of the policy and the equally clear holdings of this Court." *Id.* at 355. As the California Supreme Court explained:

> [W]e do not rewrite any provision of any contract . . . for any purpose. To do so . . . might have untoward effects generally on individual insurers and individual insureds and also on society itself. Through the standard policy, individual insurers made promises, and individual insureds paid premiums, against the risk of loss. To rewrite the provision . . . might compel insurers to give more than they promised and might allow insureds to get more than they paid for, thereby denying their "general[ ] free[dom] to contract as they please[ ]."

Id. at 356 (quoting *Certain Underwriters at Lloyd's of London v. Superior Court*, 16 P.3d 94, 108 (Cal. 2001)) (internal quotations and citations omitted).

Spaulding, Morton, and *Rosen* illustrate the tendency in New Jersey and some other states to interfere with the right to contract by setting aside clear policy language in favor of amorphous public policy considerations. In this realm, free of the restraint of contract terms, there is a serious risk of bias against insurers and others perceived as "deep pockets." In CICLA's and AIA's experience, courts sometimes are tempted, notwithstanding insurance contract terms, to shift from a governmental entity or local business to its insurers the burden of cleaning up pollution or compensating individuals harmed by a company's products or conduct.

In particular, state court judges – especially elected state court judges – face pressure from many quarters to decide cases at the expense of out-of-state insurance companies. As one commentator concluded, many "supreme tribunals allow extralegal factors, which have little to do with the merits of the suits, to influence the disposition of insurance-related cases." *See* Willy E. Rice, *Judicial Bias, The Insurance Industry And Consumer Protection: An Empirical Analysis of State Supreme Courts' Bad-Faith, Breach-Of-Contract, Breach-Of-Covenant-Of-Good-Faith And Excess-Judgment Decisions, 1900-1991*, 41 Cath. U. L. Rev. 325, 331 (Winter 1992). In this case, that tendency has resulted in an error in violation of the mandates of due process.

III. SUPREME COURT REVIEW IS NECESSARY BECAUSE ENFORCING UNAMBIGUOUS CONTRACT PROVISIONS IS CRITICAL TO THE STABILITY OF THE INSURANCE SYSTEM.

Adherence to the plain meaning of insurance contracts allows the insurance market to function properly. Insurance companies and other businesses throughout New Jersey and the nation conduct their affairs based on the expectation that the courts will enforce the contracts they enter into as they are written. Judicial fidelity to the basic principles of due process and contract law is critical to the confidence of insurers in the marketplace.

Insurers must rely on contract predictability to assess their risk in entering into an insurance policy. Across large numbers of policyholders, risk of loss such as fire, automobile collisions, and the like can be actuarially predicted. The risk of a judge concluding that a contractual provision is not "fair" cannot be. State regulatory and statutory schemes require insurers to predict their risk in order to charge product premiums and set aside appropriate reserves. To do this, insurers need to know that the parties to an insurance contract enjoy the same rights of due process and the same legal protections as do parties to other commercial contracts.

The New Jersey Supreme Court's ruling in *Spaulding* does not affect the Petitioner alone. It affects all insurers by injecting uncertainty into their ability to rely on courts to enforce insurance contracts even-handedly and as a matter of law, and not abrogate unpopular terms in favor of what they perceive to be a better result.

CONCLUSION

For the foregoing reasons, CICLA and AIA respectfully submit that the Court should grant the Petition for a Writ of Certiorari.

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